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In The
Supreme Court of the United States
October Term, 1995

LELAND A. COOPER, ET AL.
PETITIONERS

v.

COMMISSIONER OF REVENUE OF MASSACHUSETTS
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

PETITION FOR WRIT OF CERTIORARI

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34 pp

QUESTION PRESENTED

Does Massachusetts's policy of requiring federal military retirees to pay state income tax on their retirement benefits while completely exempting from state tax the retirement benefits of all state and municipal retirees violate 4 USC §111 which prohibits states from taxing federal employees in a discriminatory fashion?

LIST OF PARTIES

The parties to the proceeding below were the 28 petitioners: Kenneth and Mary Depperman, Kenneth Cadran, Leland Cooper, Norman and Rosa Cupfender, Robert and Annetta Davenport, William and Junko Feddema, David Flanagan, William and Diane Flanagan, Peter and Delores Haritos, William and Rhoda Hurley, Ralph and Joan Jacobson, Selma Levine, Antonio Maglione, Jr., Kent and Eleanor Mathews, Leslie Mears, Bernie Thompson, William Wroblicka, John Thurston and Kenneth E. Bixby, Jr. who are all federal military retirees, their spouses or dependents. The respondent before the Court is the Commissioner of Revenue of the Commonwealth of Massachusetts.

TABLE OF CONTENTS

OPINION BELOW 2

JURISDICTION 2

STATUTE INVOLVED 2

STATEMENT OF THE CASE 2

Preliminary Statement 2

Statement of Facts and Prior Proceedings 3

SUMMARY OF ARGUMENT 4

REASONS FOR GRANTING THE WRIT 5

I. 4 USC §111 PROHIBITS A STATE FROM TAXING MILITARY RETIREMENT BENEFITS WHEN IT DOES NOT TAX STATE AND MUNICIPAL RETIREMENT BENEFITS. 5

A. Davis, Barker, Reich and the Significant Differences Requirement 5

B. The Statutory Tax Exemption for State, But Not Federal, Retirement Benefits Violates 4 USC §111. 9

C. Exempting State, But Not Federal, Non-Contributory "Pension" Benefits Is Prohibited By 4 USC §111. 11

D. The Differences Between Massachusetts' Retirement System and the Federal Military System are Not Sufficient for the State To Satisfy 4 USC §111. 14

E. The Double Taxation Red Herring 16

CONCLUSION 16

TABLE OF AUTHORITIES

CASES

Barker v. Kansas, 503 U.S. 594,
118 L. Ed. 2d 243 (1992) ..... 3, passim

Brown v. Mierke, 191 W. Va. 120, cert. den. -- U.S. --,
130 L. Ed. 2d. 136 (1994) 10, 14n

Cooper v. Commissioner of Revenue,
421 Mass. 557 (1995) 2, 18

Davis v. Michigan Dept. of Treasury,
489 U.S. 803 (1989) ..... 5, passim

Department of Revenue v. ACF Industries, Inc., -- U.S. --,
127 L. Ed. 2d 165 (1994) 8, 10n

Filios v. Commissioner of Revenue, 415 Mass. 806 (1993),
cert. den. -- U.S. --, 128 L. Ed. 2d 191 (1994) ..... 3, passim

Heard v. Commissioner, 326 F. 2d 962 (8th Cir. 1964) 17

Maryland v. Baltimore Radio Show, 338 U.S. 912 (1950) .. 3n

McCulloch v. Maryland, 4 Wheat (17 U.S.) 316 (1819) 5

Reich v. Collins, 513 U.S. --, 130 L. Ed. 2d 454 (1994) 5

TrinityFarm Construction Company v. Grosjean,
291 U.S. 466 (1933) 10n

Washington v. United States, 460 U.S. 536 (1983) 10n

STATUTES

4 USC §111 ..... 2, passim

26 USC §61 17

26 USC §72 17

26 USC §414(h)(2) 15

28 USC §1257 2

Mass. G.L.c. 32, §1, ¶8 11

Mass. G.L.c. 32, §1, ¶11 ..... 12, 12n

Mass. G.L.c. 32, §1, ¶30 11

Mass. G.L.c. 32, §1, ¶31 ..... 12, 12n

Mass. G.L.c. 32, §22(10) 14

Mass. G.L.c. 62, §2(a) 15n, 17

Mass. G.L.c. 62, §2(a)(1)(I) 15n

Mass. G.L.c. 62, §2(a)(2)(E) ..... 8, passim

Mass. G.L.c. 62, §3(B)(a)(4) 15

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Petitioners Leland A. Cooper, et al. respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts, entered in the above-titled case on December 26, 1995.

OPINION BELOW

The opinion of the Supreme Judicial Court is reported at 421 Mass. 557 (1995) and is reprinted in the Appendix at A. 3-8.

JURISDICTION

The jurisdiction of this Court to review the judgment of the Supreme Judicial Court is invoked pursuant to 28 U.S.C. § 1257.

STATUTE INVOLVED

This case involves 4 USC § 111 which provides, in material part, as follows:

> The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States, . . . if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation.

STATEMENT OF THE CASE

Preliminary Statement

This case involves 19 veterans, spouses and dependents[1] upon whose military retirement benefits Massachusetts has levied an illegal tax. Petitioners raise only one issue: when Massachusetts "taxes the benefits received from the United States by military

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1. Originally 19 separate cases (involving a total of 28 taxpayers) were consolidated and decided by the Massachusetts Appellate Tax Board. A. 1-2. The veterans filed a single appeal from that decision and the Supreme Judicial Court issued one opinion. A. 3-8.

retirees but does not tax the benefits received by retired state and local government employees . . . ," is it violating federal law? See Barker v. Kansas, 503 U.S. 594, 118 L.Ed. 2d 243, 248 (1992). In Barker this Court answered that very question in the affirmative. Petitioners suggest the same answer applies here.

Statement of Facts and Prior Proceedings

Petitioners are all residents of the Commonwealth who received income from military retirement benefits for some or all of the tax years 1986 to 1992 (the "veterans"). Appendix ("A.") 4. Each paid Massachusetts income tax on that retirement income and each filed timely abatement appeals with the Massachusetts Appellate Tax Board. A. 1-2. Before the Board, the Commissioner made a motion to "dismiss on the pleadings" all of those appeals. A. 8, n. 4. His motion was based solely on the prior decision of the Supreme Judicial Court in Filios v. Commissioner of Revenue, 415 Mass. 806 (1993), cert. den. -- U.S. -- , 128 L. Ed. 2d 191 (1994).[2] A. 1. The Board granted that motion. A. 1-2. The veterans appealed and the Supreme Judicial Court granted direct review. A. 4. On December 26, 1995, the Supreme Judicial Court ruled against the veterans. A. 3-8.

Finally it is not disputed that Massachusetts provides a "complete exemption from taxation of all of the retirement benefits" of every retired state and municipal employee. Filios, 415

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2. Filios was a test case brought by a number of veterans and spouses raising many of the issues raised here. Of course the denial of certiorari in Filios has no precedential significance. See, e.g., Maryland v. Baltimore Radio Show, 338 U.S. 912, 919 (1950) (Frankfurter, J. dissenting from denial of certiorari). Reliance on the denial in Filios would be particularly unwarranted since Respondent opposed certiorari in that case (No. 93-1145) on timeliness, as well as substantive, grounds.

Mass. at 810.[3] Thus while every federal military retiree pays full state income tax on his or her retirement benefits, every state and local retiree's benefit is completely exempt from that tax.

SUMMARY OF ARGUMENT

Petitioners' case is based on one stark fact. Massachusetts requires federal military retirees to pay state income tax on retirement benefits which they receive from the United States while it exempts from that tax the retirement benefits received by all state and municipal retirees. That discrimination is not justified by "significant differences" between the two categories of retirees and therefore it violates the anti-discrimination rule of 4 USC § 111.

Petitioners first point to a number of state laws which expressly grant income tax exemptions to certain state and local retirees who entered employment before 1938. While that explicit favoritism affects relatively few state retirees, by itself it is sufficient to trigger section 111.

Second, and more generally, petitioners point to the state's policy of exempting from tax the non-contributory "pensions" which state and local retirees receive. Those pensions, which amount to 90% of the total retirement benefit, are identical in every way to military retirement benefits and their exemption from tax is a second, and broader, discrimination against federal retirees.

Finally, petitioners note that actual post-tax "contributions" made by employees to the state retirement system constitute such an infinitesimal fraction of the system's funds as to make the state and federal systems functionally equivalent. Thus there are not

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3. Below the court referred to a 15 year-old administrative ruling which suggested that a "non-contributory pension received by a retired [state] employee" would be taxable. 421 Mass at 559, A. 5. However, as discussed below, contrary to the court's dictum, non-contributory "pensions" received by state retirees are <u>not</u> taxed.

sufficient "significant differences" between the two systems which would justify differential tax treatment in light of section 111.

REASONS FOR GRANTING THE WRIT

I. 4 USC § 111 PROHIBITS A STATE FROM TAXING MILITARY RETIREMENT BENEFITS WHEN IT DOES NOT TAX STATE AND MUNICIPAL RETIREMENT BENEFITS.

A. Davis, Barker, Reich and the Significant Differences Requirement

This case involves the legality of Massachusetts' policy of taxing the retirement benefits of retired federal military personnel while it exempts from tax retirement benefits received by retired state and municipal employees. In Massachusetts all military retirees pay a state income tax on their retirement benefits while all state and municipal retirement benefits are exempt from that tax. That discrimination violates the terms set by Congress when it gave the states authority to tax federal employees.

The law on this point was recently restated when, speaking for a unanimous Court, Justice O'Connor wrote:

> For many years, numerous states . . . exempted from state personal income tax retirement benefits paid by the State, but not retirement benefits paid by the Federal Government . . . . In March 1989, this Court held that such a tax scheme violates the constitutional intergovernmental tax immunity doctrine, which dates back to McCulloch v. Maryland, 4 Wheat (17 U.S.) 316 (1819), and has been generally codified at 4 U.S.C. §111. See Davis v. Michigan Dept. of Treasury, 489 U.S. 803 (1989).

Reich v. Collins, 513 U.S.--, 130 L. Ed. 2d 454, 457 (1994)

Section 111 represents a Congressional decision to partially

cede the federal government's absolute constitutional immunity from state taxation of its employees. That concession was made subject to the express condition that such taxation must be equitable; states may not tax federal employees more onerously than they tax their own employees. Thus the United States consents to state taxation of its officers' and employees' compensation, but only ". . . if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation." 4 USC §111.

That principle has been developed in two recent cases in which this Court struck down state efforts to discriminate in favor their retirees. See Davis v. Michigan Dept. of Treasury, 489 U.S. 803 (1989); Barker v. Kansas, 503 U.S. ___, 118 L.Ed. 2d 243 (1992). In Davis the Court held that the non-discrimination clause of section 111 applies to retirement benefits paid to retired federal employees and that individual retirees could sue to obtain the protection of that clause. 489 U.S. supra at 808-810, 814-15. The Court rejected the state's argument that the allegedly more generous benefits federal retirees receive was a "significant difference" that justified its discrimination between state and federal employees. It found that the state's argument that federal employees receive more generous retirement benefits than state employees, even if true, did not warrant a "blanket exemption" for state retirement benefits which favored them over federal workers. Id. at 817. As Justice Kennedy wrote:

> The danger that a State is engaging in impermissible discrimination against the Federal Government is greatest when the State acts to benefit itself and those in privity with it. . . . Taxes enacted to reduce the State's employment costs at the expense of the federal treasury are the type of discriminatory legislation that the doctrine of intergovernmental tax immunity is intended to bar.

489 U.S. at 815, n.4

In 1992 in Barker, the Court restated its Davis holding that, in applying section 111, the appropriate inquiry is "whether the inconsistent tax treatment is directly related to, and justified by, significant differences between the two classes." 118 L. Ed. 2d at 249 (citation omitted)(emphasis supplied). It concluded military retirees are protected by section 111 and it reversed a decision by the Kansas Supreme Court that there were significant differences between federal military and state civilian retirees. Id. at 254.[4]

Both Davis and Barker focus on differences in how the state treats federal and state retirees. A tax that favors state retirees over federal retirees violates intergovernmental immunity even if the latter are treated no worse than private retirees. The veterans contend here that Massachusetts' laws, facially and as applied, favor state and municipal retirees. As discussed below, Massachusetts has not met its burden of showing that that favoritism is justified by "significant differences" between the two groups.

In Filios, the Supreme Judicial Court held that there were "significant differences" between federal military retirees and state retirees such that differential treatment did not offend section 111. See 415 Mass. at 809. Apparently the court has now reconsidered its approach. In the instant case the same judge who decided Filios refused to decide whether sufficient "significant differences" do exist. See 421 Mass. at 562, n.5; A. 8. Instead the court rested its holding on a different point, a conclusion that "the statute does not discriminate against the [federal] officer or employee because of the source of the pay . . " Id.(Emphasis added).

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4. In Barker the Court noted that while the Kansas Supreme Court had observed that state retirees contribute to their retirement funds while military retirees do not, it did not base its holding of a "significant difference" on that point. Id. at 254, n. 5. The contributory/non-contributory issue thus was not decided in Barker. See Filios, 415 Mass. at 809, n.5.

That approach is doubly flawed. First, the veterans are not challenging Mass. G.L.c. 62, §2(a)(2)(E), the law the Commissioner and the lower court relied upon.[5] Rather they challenge the impact of an package of laws and interpretations which has the effect of treating them in a fashion worse than every state and local retiree.

Second, the Massachusetts court simply misapplies the applicable "discrimination" test. There is no suggestion in either Davis or Barker that for discrimination to violate section 111, there must be a showing of anti-federal animus or a deliberate legislative intent to punish federal workers. Rather, as Justice Stevens noted in another context, in applying a law like section 111 which does not define discrimination, ". . . the sensible test for prohibited discrimination" is to focus "on whether the protected class is being treated substantially less favorably than most similarly situated persons . . . " See Department of Revenue v. ACF Industries, Inc. --U.S.--, 127 L. Ed. 2d 165, 181 (1994)(Stevens, J. dissenting). Davis teaches that for purposes of section 111, state retirees comprise the "similarly situated persons"[6]. As noted above, it is undisputed that, when it comes to Massachusetts' income tax, military retirees are certainly treated "substantially less favorably." Thus, despite the lower court's reticence, the dispositive issue here is whether the state has shown a "significant difference" between the retirement benefits of state workers and federal military retirees

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5. The veterans concede that facially that statute treats recipients of federal and state retirement benefits identically. But the issue raised here is that the ultimate difference in tax treatment accorded to those two categories of retirees is not a simple consequence of that statute, but reflects a clear commitment by Massachusetts to exempt all retirement benefits received by its retirees, regardless of what that statute or other provisions of state law would otherwise call for.

6. The situation is somewhat different in connection with the veterans' first argument which involves the significance of the state's statutory exemption for non-contributory pensions of a class of employees who entered state service before 1938.

which justifies exempting the one while taxing the other?

B. The Statutory Tax Exemption for State, But Not Federal, Retirement Benefits Violates 4 USC §111.

As discussed below, the heart of the Massachusetts' position is that the key distinction in state law is not between federal and state retirees but between "contributory" and "non-contributory" pension systems. See, e.g., 421 Mass. at 559, A. 5. But the validity of that distinction need not be addressed, because Massachusetts' law also still reflects a long-standing, explicit state policy of absolutely exempting certain state and local pensions from tax.

From enactment of the first Massachusetts income tax, the state exempted pensions received by Boston teachers and local police and firemen. Filios, 415 Mass. at 811. In 1973 the legislature provided that "[n]otwithstanding any general or special law to the contrary, income from a noncontributory annuity or pension allowance . . . shall be exempt from taxation under [the income tax.]" Id. This law remains in effect. These exemptions demonstrate that Massachusetts expressly favors some of its retirees over federal retirees, exactly what federal law prohibits. See Davis, 489 U.S. at 815, n.4.

In Filios the Massachusetts court responded to this showing of favoritism by changing the issue. It held that the relevant point was that the state's laws, taken together, do not deny to federal employees generally any favorable treatment they give to state and local government employees. Id. at 811-12. The court cited no authority for adding that gloss to Barker and Davis. It criticized the veterans for presenting no evidence as to which and how many state or local retirees benefit from these exemptions, id. at 811, and held that without such evidence it could not find there were any such employees, opining "it is unlikely [such employees] were numerous, or . . . will survive long enough to require legislative action to remove their more favorable treatment." Id. at 811-12.

That evidentiary problem has now been resolved. As Supreme Judicial Court realized in the instant case, "because the taxpayers' claims were dismissed without a hearing, we must assume that the taxpayers could prove the existence of such retirees." 421 Mass. at 562, n.4; A. 8. The court therefore fell back on its alternative Filios argument, namely that because the class of retirees which the state favors was "small and dwindling" section 111 was not violated. Id., citing Brown v. Mierke, 191 W. Va. 120, cert. den. -- U.S. --, 130 L. Ed. 2d 136 (1994).

That argument finds no support in Davis or Barker. Neither case required federal retirees to show how many state workers were in the favored class or that "actual discrimination" was being practiced. Even if only a limited number of retirees still benefit from Massachusetts' statutory favoritism, the resulting discrimination is unambiguous. In enacting 4 USC §111, Congress granted states the privilege to tax federal employees but only on a strict condition of non-discrimination.[7] Since the state does not

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7. Neither Davis nor Barker suggests how to measure discrimination barred by section 111. Cases in other areas suggest two tests. The first, and stronger, finds that a state discriminates against those associated with the federal government if "it treats someone else better than it treats them." Washington v. United States, 460 U.S. 536, 545 (1983) (emphasis added). Application of that rule "does not depend upon the amount of the exaction, the weight of the burden or the extent of the resulting interference with sovereign independence. Where it applies, the principle is an absolute one wholly unaffected by matters or distinctions of degree." TrinityFarm Construction Co. v. Grosjean, 291 U.S. 466, 471 (1933)(emphasis added). Application of the "most favored taxpayer" test to section 111 would require a ruling in the veterans' favor.

The second test is "the sensible test for prohibited discrimination" proposed by Justice Stevens in Department of Revenue v. ACF Industries, Inc. --U.S.--, 127 L. Ed. 2d 165, 181 (1994). That test looks at "whether the protected class is being treated substantially less favorably than most similarly situated persons . . . ." The

meet that condition, it has lost the privilege granted by section 111.

C. Exempting State, But Not Federal, Non-Contributory "Pension" Benefits Is Prohibited By 4 U.S.C. §111.

The veterans do not rely solely on those Massachusetts laws which expressly exempt some state retirement benefits from tax. The second reason why Massachusetts is illegally discriminating against them is the state's practice of exempting from state tax the non-contributory "pensions" received by every state retiree. The Supreme Judicial Court's only response to that issue was to rely on Mass. G.L.c. 62, §2(a)(2)(E)("section 2E") which exempts from state tax income from "any contributory annuity, pension, . . . or retirement fund . . . to which the employee has contributed." 421 Mass. at 558; A. 4(Emphasis added). It held that the Commonwealth's pension "system" is "contributory" while the federal military pension system is "non-contributory." That distinction, it held, is "dispositive" and enough to pass muster under section 111. 421 Mass. at 560; A. 6.

The first flaw in the court's reasoning is that the Massachusetts public retirement program is not the simple one-dimensional "system" that its opinion suggests. By law each employee's retirement benefit has two components, an "annuity" derived from employee contributions and a "pension" which comes exclusively from "contributions made by the appropriate governmental unit." See Mass. G.L.c. 32, §1, ¶¶ 8,30; see also 421 Mass. at 559, A. 5. Furthermore, although the lower court did not discuss it, the "annuity" and the "pension" are each paid from a

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veterans concede that that rule, if applicable, does not aid this aspect of their case. However, as discussed below, since the ultimate issue here is the total exemption of all state retirement benefits and total taxation of all military retirement benefits, their other claims meet even this more stringent test.

separate "**fund.**" See Mass. G.L.c. 32, §1, ¶11(annuity savings fund), ¶31(pension fund). Throughout this litigation it has been conceded that the state exempts from tax the entirety of all income received by state and local retirees, not just portion of that income which reflects their contributory "annuity" paid from the annuity fund. Exemption of state retirees' "pension" benefits cannot be defended by reference to section 2E because the pension does not come from a "fund" to which the employee contributed.[8]

The court's response to this was to dismiss the veterans' position as not substantive but "technical." 421 Mass. at 559; A. 5. In a judicial tour de force, the court held that what is "dispositive" is "whether the employee contributed to the retirement system, not what account his contributions are put in, or from what account distributions are made." 421 Mass. at 560; A. 6. But as quoted above, that is simply not a correct statement of section 2E which refers to "funds" not "systems." Massachusetts' defense for exempting from tax the retirement benefits its state workers derive from non-contributory pension funds therefore cannot be based on section 2E's facially neutral language.

Yet Massachusetts does exempt benefits from the "non-contributory" pension fund. Indeed that non-contributory "pension" comprises some 90% of state employees' retirement benefits. See 415 Mass. at 811. The contributory/non-contributory dichotomy, the sole basis on which the court below relied, is thus irrelevant to these "pension" benefits which are solely derived from employer-supplied funds. Plainly there is no difference, let alone a "significant" one, between income a state retiree receives from his non-contributory "pension" and the equally non-contributory

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8. The lower court misspoke when it noted in dicta, 421 Mass. at 560; A. 6, that the "preretirement employee pays into the pension fund a percentage of after-tax wages . . . . " (Emphasis added). As noted above, all contributions go to the annuity savings fund while the pension fund consists solely of employer contributions. Mass. G.L.c. 32, §1, ¶¶ 11, 31.

retirement income received by a veteran. To paraphrase the lower court's discussion of the veterans' situation, with respect to their pensions, state workers "are beneficiaries of a 'noncontributory' system funded entirely by their former employer . . . ." 421 Mass. at 558; A. 4.

Furthermore, the state cannot defend exempting non-contributory "pensions" from tax on the ground that its retirees also receive an additional 10% in the form of a contributory "annuity." First, as noted in Davis, that would only justify exempting the contributory portion of benefits state retirees receive, not the "blanket" exemption the state actually gives them. Davis, 489 U.S. supra at 817. Second, such a system of derivatory exemptions would also be discriminatory, and violate section 111. Military retirees do not have a comparable opportunity to shelter their non-contributory retirement benefits from state tax by mixing them with contributory annuity benefits at a ratio of nine parts to one.

Massachusetts' policy of exempting its retirees' non-contributory "pension" benefits while taxing veterans' non-contributory retirement benefits clearly discriminates against federal employees. The state has failed to show that this disparate treatment is " . . . directly related to, and justified by, significant differences between the two classes" Davis, 489 U.S. supra at 816. Therefore, it is violating the plain language of 4 USC § 111 and it is not longer entitled to exercise the Congressionally granted privilege of taxing veterans' retirement benefits.

This is not a "technical" quibble based on the state's "accounting system." Cf. 421 Mass. at 560; A. 6. The favoritism the veterans challenge here does not involve only a few elderly retired firemen. It involves each and every retired state and local worker[9] and it is a stark case of favoring retirement benefits

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9. Thus this case is on all fours with Barker in which Kansas exempted every state retiree while taxing every military retiree. See 128 L. Ed. 2d at 248. On the other hand it is quite different from

received by state workers as against those of federal workers. It is a flat and blatant violation of section 111.

D. Differences Between the Massachusetts' Retirement System and the Federal Military System are Not Sufficient for the State To Satisfy 4 USC §111.

Even if Massachusetts were allowed, contrary to the language of section 2E, to shelter its retirees' noncontributory "pensions" behind the umbrella of its "contributory" system, it would not survive section 111 challenge. Regardless of the label the state and the lower court have chosen to affix to the Massachusetts' retirement system, as a matter of clear and unambiguous fact, in practical operation that system is so effectively similar to the military system that, in light of section 111, the state cannot justify taxing the two systems differently.

Massachusetts has a unique form of "contributory" retirement system. In 1987, the state amended Mass. G.L.c. 32, §22(10), so its employees no longer make any contributions, as that term is normally understood, to their retirement systems. As amended, section 22(10) now provides in part:

> Each government unit . . . shall . . . pay the contributions which would be payable by the employees as members . . . . Such contributions, although designated as employee contributions, will be paid by the applicable governmental unit . . . in lieu of contributions by the employee . . . . The contributions so assumed shall be treated as employer contributions in determining tax treatment under the United States Internal Revenue Code. The contributions so assumed shall be treated and identified . . . as member contributions for purposes of the retirement system . . . and

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Brown v. Mierke, 191 W. Va 120, 124, cert. den. 130 L. Ed. 2d 136 (1994) cited below (A.8) where West Virginia exempted from tax "less than four percent of all State government retirees."

for all purposes of chapter sixty-two [the state income tax].

Thus the lower court's statement, 421 Mass. at 560; A.6, that preretirement employees pay into the retirement system a portion of after-tax wages, while in a non-contributory system "the preretirement employee sacrifices nothing and receives full salary" is somewhat misleading. Massachusetts employees no longer pay any current federal income tax on their "contributions." 26 U.S.C. §414(h)(2). While state workers do pay state income tax on their contributions,[10] the tax paid on "contributions" is further reduced by the $2000 statutory deduction in Mass. G.L.c. 62, §3(B)(a)(4) which effectively shields employees earning less than $25,000 from ever paying any tax, state or federal, on their "contributions."[11]

Altogether then, given the small impact of state income taxes as compared to federal taxes with their higher marginal rates, if "contributory" is given its common sense meaning, Massachusetts

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10. Because Massachusetts uses the federal definition of "gross income" to define income for tax purposes under Mass. G.L.c. 62, §2(a), state employees would normally escape paying any state income tax on their retirement "contributions." But when its own revenues are involved, the state is less willing to accept its legal fictions. Taxpayers must add back into adjusted state income "contributions" excluded from federal gross income. See Mass G.L.c. 62, §2(a)(1)(I).

11. The lower court took pains to point out that employees hired after 1984 and earning over $25,000 do begin to pay some state tax on their contributions. See 421 Mass. at 561; A. 7. Given that Massachusetts' marginal tax rate is under 6%, the court's failure to quantify how much tax those workers pay is understandable. It is instructive to compare the lower court's pragmatic rejection of the veterans' first argument concerning the exemption for pre-1938 employees on the grounds that there were too few of them to make a difference with its exaltation of even one dollar of state tax paid by some employees as a sufficient "sacrifice" to justify a complete, lifetime exemption for the entirety of all state retirees' benefits.

has not had a "contributory" retirement system since 1987.

But for this Court's purposes, the key issue is that, to use the lower court's own word, state employees make very little "sacrifice" in return for their tax-free retirement benefits.[12] In light of the almost total tax protection the state provides to employee "contributions," whether or not the state system is "contributory," the differences between it and the "non-contributory" military retirement system are simply not "significant" enough to justify the total difference in tax treatment. See Davis, supra.

Plainly Massachusetts wishes to have its cake and eat it too. It classifies contributions to state and local retirement funds as employer contributions when that works to employees' advantage and classifies them as employee contributions when that, diametrically opposite, conclusion works to their advantage. This distortion of the state's tax laws in order to "benefit itself and those in privity with it" is just the sort of scheme to reduce state employment costs which Justice Kennedy held is barred by section 111. Davis, 489 U.S. supra at 815, n.4.

E. The Double Taxation Red Herring.

Finally, the veterans wish to briefly discuss the "double taxation" argument noted with apparent approval in Filios, supra at

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12. Indeed, the lower court's decision verges on recognizing that the state's rationale for the exemption is a verbal sleight of hand. The decision notes, 421 Mass. at 561, n.3; A. 7, that the exclusion under section 2E "does not turn on whether the employee contributions were taxed by the Federal government, but on whether the contributions were made in the first place." But a "contribution" made by the employer on which no taxes are ever paid is no "contribution" at all and is indistinguishable from how the federal government funds military retirement benefits. A state cannot avoid section 111 by simply relabeling its own payments to its retirement system as "contributions."

810. That argument, that exemption of the entirety of state and local retirement benefits from state income tax is needed to prevent double taxation of employee contributions, was wisely not raised by the court in Cooper. In any event, it is plainly wrong even if the analysis is narrowed to look solely at the minute share of retirement benefits traceable to taxable employee "contributions."

Federal law already exempts from gross income the portion of retirement benefits which reflects a return of a retiree's contributions. See 26 USC §§ 61, 72; Heard v. Commissioner, 326 F. 2d 962 (8th Cir. 1964)(income tax only on income in excess of contribution). The state's reliance upon the federal definition of gross income, Mass. G.L.c. 62, §2(a), automatically imports that exclusion into the state income tax system.

Thus the only effective function of the section 2E exemption is to exempt from state tax the remaining part of retirement benefits which has not already been excluded, namely that part of a retiree's check which does not reflect return of his or her contributions. Once more therefore the "contributory" language of section 2E acts as no more than a flag of convenience behind which the state can carry out its program of providing blanket tax protection to its retirees' benefits.

CONCLUSION

Petitioners do not challenge Massachusetts' right to exempt from tax its workers' retirement benefits. Contrary to the suggestion below, 421 Mass. at 560; A. 6, they do not ask the state to tax its retirees or to change its retirement system. Rather, because section 111 promises them fairness in state taxation of their federal retirement benefits, they challenge Massachusetts' practice of taxing their retirement benefits while continuing to exempt from that tax all retirement benefits received by state and local retirees.

The only constancy in the state's justifications for its

actions is their mutability.[13] When the veterans asked the court below to consider the plain fact that all state retirement benefits are tax exempt, while all military retirement benefits are taxed, it looked only to the facial neutrality of the law as it stands on the statute books. When the taxpayers opened those books to point to laws that expressly exempt some non-contributory benefits, the court dismissed that by claiming those laws apply to a "small and dwindling class" (of few hundred or thousand). When the veterans noted that state law provides that 90% of the benefit each state retiree receives is a non-contributory, but tax-exempt, "pension," it found concern over such "technical distinction[s]" "misplaced." 421 Mass. at 559; A. 5. The common thread is the state's determination to exempt its retirees from tax while fully taxing federal military veterans.

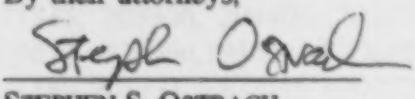
To quote from the amicus brief which the United States filed with the Supreme Judicial Court below, "Massachusetts's facially discriminatory taxation of military retirement benefits lacks any coherent or consistent rationale. It is therefore invalid under 4 USC § 111." Brief of the United States as Amicus Curiae in Cooper v. Commissioner, No. 6747 at 8. Two years ago in Filios, the Solicitor General warned that "[i]f the decision in this case were allowed to stand, it would serve as a guidepost for States seeking to circumvent the clear restrictions imposed by 4 U.S.C. 111 and this Court's prior decisions." Brief for the United States as Amicus Curiae in Filios v. Commissioner of Revenue, No. 93-1145 at 8. That danger has, if anything, worsened with the passage of time.

---

13. With apologies to the philosopher Heraclitus.

For the foregoing reasons, petitioners request that their application for a writ of certiorari be granted and that, after hearing, the December 26, 1995 decision of the Supreme Judicial Court of the Commonwealth of Massachusetts be reversed.

Respectfully submitted,
Leland A. Cooper et al.
By their attorneys,



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DATED: Boston, Massachusetts: March 20, 1996.

The Commonwealth of Massachusetts
Appellate Tax Board

Leverett Saltonstall Building, Government Center
100 Cambridge Street, Boston 02202

Docket Nos. 171116-171117, 171959, 171472, 171883, 203306, 204400, 204675-204677, 179066,191604, F206610, 191580, 203737, F207945, F207727, F207983, F208676, F210391, F211152, F211150-F211151, 213952, F215204, F207669, 179525, 178617, F214556, 171320, 177931, 179486, 198062, F212998

LELAND COOPER, et al.

v.

COMMISSIONER OF REVENUE

DECISION

The Appellee's motion for judgment on the pleadings is granted.

The parties have raised no issue of law or fact that were not addressed and disposed of by the Supreme Judicial Court in Filios v. Commissioner of Revenue, 415 Mass. 806 (1993), cert. den. 128 L. Ed. 191, affirming the Board's Decision and subsequent Findings reported in 14 Mass. A.T. B. Rep. 77 (Docket Nos. 171106 et al., July 1, 1992).

Decision for the Appellee.

APPELLATE TAX BOARD

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Date: August 26, 1994

LELAND COOPER & others[1] *vs.* COMMISSIONER OF REVENUE.

Suffolk. September 13, 1995. - December 26, 1995.

Present: LIACOS, C.J., ABRAMS, LYNCH, & O'CONNOR, JJ.

Taxation, Income tax, Abatement. *Constitutional Law*, Income tax. *Retirement.*

Where Massachusetts tax law distinguishes between contributory and noncontributory retirement plans, taxing as income distributions of benefits from the latter but exempting the former, and treats retirement benefits paid by the Commonwealth and by the Federal government in the same manner for tax purposes, neither G. L. c. 62, § 2 (*a*) (2) (E), nor St. 1973, c. 876, violates 4 U.S.C. § 111 (1994), with the result that Massachusetts residents who paid State income taxes on Federal military pension income from 1986 to 1992 were not entitled to an abatement inasmuch as that retirement system was noncontributory. [558-562]

APPEAL from a decision of the Appellate Tax Board.

The Supreme Judicial Court granted an application for direct appellate review.

Stephen S. Ostrach for the taxpayers.

Douglas H. Wilkins, Assistant Attorney General (*Thomas A. Barnico*, Assistant Attorney General, with him) for the Commissioner of Revenue.

Loretta C. Argrett, Assistant Attorney General, *Gary R. Allen, David English Carmack & Kevin M. Brown*, of the District of Columbia, for The United States, amicus curiae, submitted a brief.

ABRAMS, J. The plaintiff taxpayers appeal from the Appellate Tax Board's dismissal on the pleadings of their claims for abatement of State income tax paid on Federal retire-

[1]Twenty-seven other taxpayers.

ment benefits. They urge us to overrule *Filios* v. *Commissioner of Revenue*, 415 Mass. 806 (1993), cert. denied, 114 S. Ct. 1538 (1994). We allowed the plaintiffs' application for direct appellate review. We affirm.

The taxpayers are Massachusetts residents who paid State income taxes on Federal military pension income from 1986 to 1992. Their abatement claim is grounded in 4 U.S.C. § 111 (1994), which provides: "The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States . . . or political subdivision thereof . . . by a duly constituted taxing authority . . . if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation." Where State law imposes a heavier tax burden "because of the source of the pay or compensation," § 111 is violated unless "the inconsistent tax treatment is directly related to, and justified by, 'significant differences between the two classes.'" *Barker* v. *Kansas*, 503 U.S. 594, 598 (1992), quoting *Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. 803, 816 (1989). The taxpayers here argue that 4 U.S.C. § 111 is violated by G. L. c. 62, § 2 (*a*) (2) (E) (1994 ed.), and by St. 1973, c. 876. We do not agree.

General Laws c. 62, § 2 (*a*) (2) (E), exempts "[i]ncome from any contributory annuity, pension, endowment or retirement fund of the United States government or the commonwealth or any political subdivision thereof . . . to which the employee has contributed." Under the statute, benefits received by employees who contributed to the pension system during their State or Federal employment are exempt from State taxation, and employees (whether State or Federal) who did not contribute a portion of their salary to the retirement system must pay State taxes on their benefits. Most employees of the Commonwealth pay a percentage of their salaries into the retirement system during their working years. G. L. c. 32, § 22 (1994 ed.). The taxpayers, on the other hand, are beneficiaries of a "noncontributory" system funded entirely by their former employer, the Federal government. The Commissioner of Revenue asserts that the tax-

payers' pension benefits are therefore taxable under G. L. c. 62, § 2 (*a*) (2) (E). The taxpayers claim that the statute violates 4 U.S.C. § 111. We agree with the commissioner.

Massachusetts tax law distinguishes between contributory and noncontributory retirement plans, not between State and Federal retirees. "The determining factor for the Massachusetts exemption is whether the retirement fund is a 'contributory fund to which the employee has contributed.' " Technical Information Release (TIR) 89-6 (May 10, 1989), 2 Official MassTax Guide at 369 (West 1995). "Any Federal retirement income is exempt from Massachusetts tax if the system is contributory and the employee actually contributed," *id.*,[8] and, on the other hand, "[a] non-contributory government pension, received by a retired employee of [a political subdivision of the Commonwealth] . . . is includible in the Massachusetts gross income of the employee . . . in the taxable year in which the pension is paid." Letter Ruling 81-51 (June 11, 1981), *supra* at 576. In sum, the statutory provisions treat retirement benefits paid by the Commonwealth and the Federal government in precisely the same way.

The taxpayers argue that a retired employee of the Commonwealth receives "annuity" payments from the employee's own contributions and "pension" payments from the Commonwealth's contributions, so that the State employee does not contribute to the "pension fund." The taxpayers conclude that to tax their pension benefits is discriminatory because the State retiree is receiving a State tax-free "pension." If the taxpayers were correct we would be required to interpret G. L. c. 62, § 2 (*a*) (2) (E), so as to yield different results depending not on the substantive distinction whether employees contribute, but rather on the technical distinction of how

[8]Accord TIR 78-1 (Jan. 9, 1978) 2 Official MassTax Guide at 309 (West 1995) ("Income received from an employee benefit plan is generally taxable . . . . An exception is provided for amounts received from any annuity, pension, endowment or retirement fund of the United States government or the Commonwealth . . . to which the employee has contributed . . .").

the Commonwealth accounts for contributions. We conclude that the taxpayers are not correct, and that their focus on the State's accounting system is misplaced. The dispositive inquiry under G. L. c. 62, § 2 (*a*) (2) (E), is whether the employee contributed to the retirement system, not what account his contributions are placed in, or from what account distributions are made. The State worker is required to make regular, State-taxed, contributions to the retirement system in order to get a State tax-free pension on retirement. The taxpayers here made no such contribution.

Further, the result advocated by the taxpayers would require the Commonwealth either to discriminate against contributing employees in favor of noncontributing employees by taxing both contributions when made and benefits when received or, alternatively, to make the State retirement system noncontributory so as not to favor noncontributing employees. We do not think "the modern constitutional doctrine of intergovernmental tax immunity" codified in 4 U.S.C. § 111 requires such a result. *Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. 803, 813 (1989).

We also do not agree with the taxpayers that the distinction made by the Commonwealth between contributing and noncontributing employees is "only a cloak for discrimination against federally funded benefits." *Barker*, *supra* at 604-605. Disparate treatment is justified by the fact that, in the Commonwealth's contributory system, the preretirement employee pays into the pension fund a percentage of after-tax wages, while in a noncontributory system the preretirement employee sacrifices nothing and receives full salary.[3]

[3]Employee contributions are subject to State tax pursuant to G. L. c. 62, § 2 (*a*) (1) (I). They are designated "employer contributions" by G. L. c. 32, § 22 (10), for Federal income tax purposes, not to exempt the employee from taxation, but to defer Federal taxation until benefits are received. See 26 U.S.C. § 414(h); *Howell* v. *United States*, 775 F.2d 887, 889-890 (7th Cir. 1985).

Because such designation and deferral of Federal taxation is specifically authorized by 26 U.S.C. § 414(h), it is difficult to understand the taxpayers' argument that such designation evidences discrimination violative of 4 U.S.C. § 111. We note, at any rate, that exclusion under G. L. c. 62,

Furthermore, we do not agree with the taxpayers that the contribution of a Massachusetts State employee is illusory. General Laws c. 32, § 22 (1) (*b*), requires a contribution of five per cent from employees who began service prior to 1975, seven per cent from employees who began service between 1975 and 1984, and eight percent from employees who began service after 1984. General Laws c. 32, § 22 (1) (*b*½), requires an additional two per cent of the salary in excess of $30,000 from employees who began service after 1978. Although G. L. c. 62, § 3 (B) (*a*) (4), allows a taxpayer to deduct up to $2,000 from gross income for retirement system contributions, the taxpayers are mistaken in asserting that this provision "effectively shields employees earning less than $40,000 from ever paying any tax on their 'contributions.' " On the contrary, as the commissioner points out, a State employee hired after 1984 and earning between $25,000 and $30,000 (and therefore subject only to the eight per cent rate) would be subject to tax despite the $2,000 deduction. For State employees earning over $30,000 (and who are therefore subject to the additional two per cent contribution required by G. L. c. 32, § 22 [1] [*b*½]), the tax is even more significant.

The taxpayers also argue that 4 U.S.C. § 111 is violated by St. 1973, c. 876. Chapter 876 is a "grandfather" provision which exempts from taxation "income from a noncontributory annuity or pension allowance received on account of service in a police or fire department of a town by a person . . . who was in the employ of such . . . department at the time of the establishment of the contributory retirement system" in 1936 and 1937.[4] We do not think this provision dis-

§ 2 (*a*) (2) (E), does not turn on whether the employee contributions were taxed by the Federal government, but on whether the contributions were made in the first place.

[4]The contributory system was established by St. 1936, c. 318 and St. 1937, c. 336. To receive the favored treatment about which the taxpayers complain, one would have had to be employed by a Massachusetts police or fire department before 1938, declined to join a contributory plan, and received benefits from a noncontributory plan from 1986 to 1992.

criminatory in the meaning of 4 U.S.C. § 111. Chapter 876 favors a class of retirees not "because . . . the source of the pay or compensation" is the Commonwealth rather than the Federal government, but on the basis of occupation (police and firefighters) and date of first employment (before 1938). Furthermore, St. 1973, c. 876, protects a small and dwindling class; we do not think it can be credibly argued that it constitutes "discrimination against federally funded benefits." *Barker*, *supra* at 604-605. Accord *Brown* v. *Mierke*, 191 W.Va. 120, 124, cert. denied sub nom. *Brown* v. *Paige*, 115 S. Ct. 207 (1994) (distinguishing statutes which discriminate *against* Federal retirees from statute *favoring* a narrow class of State retirees). See also *Alarid* v. *Secretary of the N.M. Dep't of Taxation & Revenue*, 118 N.M. 23, 29 (Ct. App. 1994), cert. denied, 115 S. Ct. 733 (1995) (same).

Neither G. L. c. 62, § 2 (*a*) (2) (E), nor St. 1973, c. 876, discriminates on the basis of source of benefits, either facially or in effect. Therefore, neither statute violates 4 U.S.C. § 111.[8] The taxpayers' argument amounts to a request that Federal employees be treated better than State and local employees. We do not think that 4 U.S.C. § 111 requires such a result. The ruling of the board is affirmed.

So ordered.

In *Filios*, we expressed doubt that any such person existed. See *id.* at 811-812. We noted, at any rate, that the taxpayer had failed to produce one, and so could not prove discriminatory treatment. *Id.* Here, because the taxpayers' claims were dismissed without an evidentiary hearing, we assume that the taxpayers could prove the existence of such retirees.

[8]Because we conclude that the statute "does not discriminate against the officer or employee because of the source of the pay or compensation," 4 U.S.C. § 111, we need not address the parties arguments as to whether the alleged inconsistencies are "justified by, 'significant differences between the classes.'" *Barker* v. *Kansas*, 503 U.S. 594, 598 (1992), quoting *Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. 803, 816 (1989).

Supreme Court, U.S.
FILED
APR 23 1996

(2)

No. 95-1542

In the Supreme Court of the United States

OCTOBER TERM 1995

LELAND COOPER, ET AL., PETITIONERS

v.

MASSACHUSETTS COMMISSIONER OF REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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12 pp

QUESTION PRESENTED

Whether state taxation of the non-contributory retirement plan benefits paid to federal military retirees violates 4 U.S.C. 111 when all contributory and some non-contributory retirement plan benefits paid to state and local employees are wholly exempt from state tax.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Argument	4
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Barker v. *Kansas*, 503 U.S. 594 (1992)	1, 4, 5, 7
Davis v. *Michigan Dep't of the Treasury*, 489 U.S. 803 (1989)	1, 4, 5, 7
Filios v. *Commissioner*, 615 N.E.2d 933 (Mass. 1993), cert. denied, 114 S. Ct. 1538 (1994)	2, 3-4
Harper v. *Virginia Dep't of Taxation*, 509 U.S. 86 (1993)	4
Phillips Chemical Co. v. *Dumas Independent School District*, 361 U.S. 376 (1960)	5
Reich v. *Collins*, 115 S. Ct. 547 (1994)	4

Constitution and statutes:

U.S. Const. Amend. XIV (Equal Protection Clause)	5
Mass. Ann. Laws, ch. 62 (Law. Co-op. 1990):	
§ 2	
§ 2(a)(1)(I)	2
§ 2(a)(2)(E)	2, 16
§ 3B(a)(3)	3
§ 3B(a)(4)	2, 3, 6
Mass. Ann. Laws, ch. 32 (Law. Co-op. 1993):	
§ 1	6
§ 12(2)	6
§ 22	6
§ 22C	6
§ 22(10)	2
1973 Mass. Acts, ch. 876, § 1	2
4 U.S.C. 111	1, 3, 5, 7
26 U.S.C. 61(a)(9)	2
26 U.S.C. 61(a)(11)	2

In the Supreme Court of the United States

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No. 95-1542

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MASSACHUSETTS COMMISSIONER OF REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

The Commonwealth of Massachusetts requires members of the United States Armed Forces to pay state income tax on their retirement pay. Pensions and annuities paid to retired state and local government employees, however, are exempt from taxation under the Massachusetts scheme.

The States may not discriminate in taxing the income of federal employees. See 4 U.S.C. 111; *Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. 803 (1989); *Barker* v. *Kansas*, 503 U.S. 594 (1992). The

United States has a continuing interest in ensuring that its employees are not subjected to discriminatory state tax treatment.

STATEMENT

1. Massachusetts imposes an income tax on retirement benefits, pensions and annuities.[1] The State wholly exempts from this tax, however, any "[i]ncome from any contributory annuity, pension, endowment or retirement fund of the United States government or the commonwealth or any political subdivision thereof, * * * to which the employee has contributed." Mass Ann. Laws ch. 62, § 2(a)(2)(E) (Law. Co-op. 1990). Payments received by persons who participated in the pre-1938 noncontributory retirement system for state and local police and firemen are also exempt from the Massachusetts income tax. 1973 Mass. Acts, ch. 876, § 1.

Under the current, contributory retirement system for state and local employees in Massachusetts, 10% of the retirement funds are contributed by the employee and 90% by the government units. *Filios* v. *Commissioner*, 615 N.E.2d 933, 935 (Mass. 1993), cert. denied, 114 S.Ct. 1538 (1994). Massachusetts exempts from the state income tax up to $2,000 per year contributed by an employee to a retirement fund. See Mass. Ann. Laws ch. 32, § 22(10) (Law. Co-op. 1993); *id.* ch. 62, §§ 2(a)(1)(I), § 3B(a)(4). [2]

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[1] Gross income is defined for purposes of the Massachusetts tax as federal gross income subject to state adjustments. Mass. Ann. Laws ch. 62, § 2 (Law. Co-op. 1990). Pension income is included in federal gross income. 26 U.S.C. 61(a)(9) and (11).

[2] The $2,000 limit on the tax deduction for the employee share of the annual contribution is reduced by any amount that the employee has paid that year as his personal share of federal

The Massachusetts provisions have the following effect:

(i) Federal, state and local employees who participate in contributory retirement systems pay no state income tax on amounts contributed by them not in excess of $2,000 per year. Without regard to whether, and to what extent, such personal contributions have or have not in fact been taxed, and to what extent the system is funded by employee contributions, participants in "contributory" plans pay no state tax on retirement benefits as received. (ii) Police and fire employees who receive retirement benefits under the pre-1938 Massachusetts noncontributory retirement system also pay no state tax on their retirement benefits. (iii) But federal military retirees, whose pension system is noncontributory, *do* pay state income tax on retirement payments.

2. Petitioners are Massachusetts residents who paid state income taxes on federal military pension income from 1986 through 1992 (Pet. App. A4). Petitioners filed applications for abatement of the state income tax paid on their military retirement benefits with the Massachusetts Appellate Tax Board, asserting that the more favorable tax treatment afforded to the retirement benefits of state and local government employees violated the nondiscrimination requirement of 4 U.S.C. 111 and the constitutional doctrine of intergovernmental immunity (Pet. App. A4). Relying on the holding of the Massachusetts Supreme Judicial Court in *Filios* v. *Commissioner of Revenue*, *supra*, the Board rejected petitioners' claims (Pet. App. A4).

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employment taxes. Mass. Ann. Laws ch. 62, § 3B(a)(3) and (4) (Law. Co-op. 1990).

3. The Supreme Judicial Court affirmed (Pet. App. A3-A8). Noting that the retirement systems of the Commonwealth and its local governments were "contributory" and that the retirement system of the federal military was "noncontributory," the court concluded that this "determining factor" justified a different tax treatment of the retirement benefits under the plans (*id.* at A5). The court stated that the fact that Massachusetts employees contribute only 10% of the funding of the retirement benefits in their "contributory" plans does not render such contributions "illusory" (*id.* at A7). The court also concluded that the Massachusetts exemption for retirement benefits received by municipal fire and police personnel under the pre-1938 noncontributory system is not "discriminatory within the meaning of 4 U.S.C. § 111" because the exemption favors a class of retirees " 'not because * * * the source of the pay or compensation' is the Commonwealth rather than the Federal government, but on the basis of occupation (police and firefighters) and date of first employment (before 1938)" (*id.* at A8).

ARGUMENT

This decision in this case misinterprets and misapplies the decisions of this Court in *Barker* v. *Kansas*, 503 U.S. 594 (1992), and *Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. 803 (1989). [3]

1. Congress has consented to state taxation of federal employees only when "the taxation does not discriminate against the * * * employee because of

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[3] *Barker* and *Davis* apply to all open tax years and are therefore applicable to this case. See *Harper* v. *Virginia Dep't of Taxation*, 509 U.S. 86 (1993). See also *Reich* v. *Collins*, 115 S.Ct. 547 (1994).

the source of the pay or compensation." 4 U.S.C. 111. This statutory nondiscrimination requirement is coextensive with the prohibition against discriminatory taxes embodied in the constitutional doctrine of intergovernmental tax immunity. *Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. at 812-813. As the Court emphasized in *Davis*, the standard for determining whether a state tax abridges the immunities of the federal government is quite different from the standard under which state economic regulations are tested under the Equal Protection Clause. 489 U.S. at 816. Inconsistent state tax treatment of federal and state employees is permitted only when it "is directly related to, and justified by, 'significant differences between the two classes.'" *Ibid.*, quoting *Phillips Chemical Co.* v. *Dumas Independent School District*, 361 U.S. 376, 383 (1960). Applying this standard, the Court rejected as insufficient the distinctions asserted to exist between federal and state retirement programs in invalidating state tax provisions that discriminated against federal pension benefits in *Davis* and *Barker*.

In this case, Massachusetts asserts a distinction that was not directly at issue in *Davis* or *Barker*. Massachusetts taxes "noncontributory" federal military retirement benefits while exempting from tax the "contributory" retirement benefits paid to other government employees.[4] The Massachusetts

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[4] In *Barker* v. *Kansas*, the Kansas Supreme Court had noted that the military retirement system was noncontributory while the State used a contributory system. See 503 U.S. at 605 n.5. The Kansas court, however, "did not rest its decision on this difference" and this Court therefore did not directly address that issue on the merits. *Ibid.*

court reasoned that the difference between "contributory" and "noncontributory" systems is significant because the Commonwealth taxes personal contributions to the retirement system as income in the year in which the contribution is made. Under the noncontributory federal military retirement system, by contrast, pension funding is not included in the gross income of the employee and is therefore not subject to tax at the time of funding (Pet. App. A6).

This asserted distinction is unpersuasive. Massachusetts retirement benefits are principally funded through government contributions. See, *e.g.*, Mass. Ann. Laws ch. 32, §§ 1, 12(2), 22, 22C (Law. Co-op. 1993). The state or local governmental unit contributes 90% of the funding for retirement benefits; and the state and local employee is not subject to state tax on up to $2,000 per year for any funding that they contribute. See Mass. Ann. Laws ch. 62, §§ 2(a)(1)(I), 3B(a)(4) (Law. Co-op. 1990); note 2, *supra*. Thus, Massachusetts seeks to justify taxation of the *full* measure of military retired pay on the ground that some very small *part* of the benefits received by state and local employees may have previously been taxed by the State (Pet. App. A7).

The rationale of the court below is further undermined by the fact that the Commonwealth exempts from state tax all retirement benefits paid to municipal police and firemen under the pre-1938 *non*-contributory retirement plan. While the record of this case does not disclose how many persons currently receive such benefits, that does not alter the fact that the State's "nondiscriminatory" rationale is inconsistent with the State's facially discriminatory legislation.

Moreover, the rationale offered by the Supreme Judicial Court is foreclosed by this Court's decision in *Davis* v. *Michigan Dep't of the Treasury*, *supra*. In *Davis*, the State sought to justify its tax discrimination against federal retirees by contending that the retirement benefits paid to federal employees were, as a general matter, more generous than those paid to state retirees. 489 U.S. at 816-187. The Court rejected that purported justification because "[a] tax exemption truly intended to account for differences in retirement benefits would not discriminate on the basis of the source of those benefits * * *; rather, it would discriminate on the basis of the amount of benefits received by individual retirees." *Id.* at 817. Under this same reasoning, a tax intended to account for prior taxation of retirement funding would not discriminatorily exempt certain benefits based on their source; instead it would apply to retirement benefits generally and exempt benefits only to the extent that they reflect previously taxed contributions.

Under the standard applied by the Court in *Davis* and *Barker*, Massachusetts's facially discriminatory taxation of military retirement benefits lacks any coherent or consistent rationale. It is therefore invalid under 4 U.S.C. 111. If the decision in this case were allowed to stand, it would serve as a guidepost for States seeking to circumvent the clear restrictions imposed by 4 U.S.C. 111 and this Court's decisions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

LELAND A. COOPER, *et al.*,
Petitioners,

v.

COMMISSIONER OF REVENUE OF MASSACHUSETTS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts

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BRIEF *AMICI CURIAE* OF THE RETIRED OFFICERS ASSOCIATION AND TWENTY-TWO OTHER MILITARY AND VETERAN ORGANIZATIONS IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether state taxation of the non-contributory retirement benefits paid to federal military retirees violates 4 U.S.C. § 111 when contributory and non-contributory retirement plan benefits paid to state and local employees are wholly exempt from state tax?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF *AMICI*	2
REASONS FOR GRANTING THE WRIT	4
CONCLUSION	10
APPENDIX A	1a
APPENDIX B	7a
APPENDIX C	11a
APPENDIX D	15a
APPENDIX E	19a

TABLE OF AUTHORITIES

CASES — Page

Barker v. Kansas, 503 U.S. 594 (1992) ..... *passim*
Cooper v. Commissioner of Revenue, 421 Mass. 557 (1995) 5, 6, 7, 8
Davis v. Michigan Dep't of Treasury, 489 U.S. 803 (1989) ..... *passim*
Filios v. Commissioner of Revenue, 415 Mass. 806 (1993), *cert. denied*, 114 S. Ct. 1538 (1994) 4, 6
Green v. Mansour, 474 U.S. 64 (1985) 10
Harper v. Virginia Dep't of Taxation, 509 U.S. 86 (1993) ..... *passim*
Phillips Chem. Co. v. Dumas Indep. Sch. Dist., 361 U.S. 376 (1960) ..... *passim*
Reynoldsville Casket Co. v. Hyde, 115 S. Ct. 1745 (1995) 3
Rivers v. Roadway Express, Inc., 114 S. Ct. 1510 (1994) 3

STATUTES

4 U.S.C. § 111 ..... *passim*
26 U.S.C. § 61(a)(9) 5
26 U.S.C. § 61(a)(11) 5
28 U.S.C. § 1341 10
1973 Mass. Acts, Ch. 876 § 1 ..... 5, 6
General Laws C.32, § 22(10) 7
General Laws C.62, § 2 5
General Laws C.62, § 2(a)(2)(E) 5
General Laws C.62, § 3(B)(a)(4) 7, 8, 9
U.S. Const. art. I, § 8, cls. 12, 13, 14 4

OTHER AUTHORITIES

Instructions—1993 Massachusetts Resident Income Tax 7
Letter Ruling 1987-8 7
Technical Information Release 1992-3 ..... 6, 8
Technical Information Release 1995-9 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1542

LELAND A. COOPER, *et al.*,
Petitioners,

v.

COMMISSIONER OF REVENUE OF MASSACHUSETTS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts

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BRIEF *AMICI CURIAE* OF THE RETIRED OFFICERS ASSOCIATION AND TWENTY-TWO OTHER MILITARY AND VETERAN ORGANIZATIONS IN SUPPORT OF PETITIONERS

The Retired Officers Association and twenty-two other military and veteran organizations file this brief *amici curiae* in support of petitioners and urge this Court to grant the petition for a writ of certiorari and reverse the decision of the Supreme Judicial Court for the Commonwealth of Massachusetts.[1]

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[1] Counsel for petitioners and respondent have consented to the filing of this brief. Their letters of consent have been filed with the Clerk in accordance with Rule 37.2.

INTEREST OF *AMICI*

Amici are The Retired Officers Association (TROA) and twenty-two other military and veteran organizations.[2] TROA is a not for profit corporation that is dedicated to serving and protecting the interests of past and present active, reserve and retired commissioned and warrant officers in all seven of the uniformed services. Founded in 1929, TROA now has a membership of approximately 400,000 current and former officers and their survivors. TROA's mission is to support a strong national defense and to represent its members' interests before Congress, and, on rare occasions, before courts of the United States.

The twenty-two other military and veteran organizations have a combined membership of approximately one million current and former members of the uniformed services of the United States. Some of these organizations are focused on the interests of certain specializations within the uniformed service (*e.g.*, the Military Chaplains Association; the Association of Military Surgeons of the United States); some on particular branches of military service (*e.g.*, the Air Force Association; the Marine Corps League; the Fleet Reserve Association; U.S. Coast Guard Chief Petty Officers Association; U.S. Army Warrant Officers Association; Commissioned Officers Association of the U.S. Public Health Service). Some of these organizations are of relatively recent origin (*e.g.*, the Enlisted Association of the National Guard of the United States (founded in 1970); the National Order of the Battlefield Commissions (founded in 1978)); some have been championing the cause of the military services for a century or more (*e.g.*, the Jewish War Veterans of the USA (founded in 1896); the National Guard Association of the United States (founded in 1878)).

Old or new, large or small, each of the twenty-three military and veteran organizations that have joined in

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[2] A complete listing and description of the organizations joining in this brief appear as Appendix A to this brief.

this brief shares one common thread: they stand to assure that those men and women who have risked, and in some cases sacrificed, their lives in defense of the United States of America are treated with fairness and accorded the respect and dignity their service has earned. They join together in this brief because, as the decision of the Supreme Judicial Court of Massachusetts unfortunately demonstrates, state courts continue to violate the "Constitution's Supremacy Clause." *Reynoldsville Casket Co. v. Hyde*, 115 S. Ct. 1745, 1747 (1995).

Despite this Court's mandates in *Barker v. Kansas*, 503 U.S. 594 (1992), *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989), and *Phillips Chem. Co. v. Dumas Indep. Sch. Dist.*, 361 U.S. 376 (1960), the Commonwealth of Massachusetts continues to refuse to give effect to this Court's decisions as the controlling statement of federal law. The resolution of the question presented in this case—whether a state court may ignore this Court's decisions establishing the rule of nondiscrimination under the constitutional doctrine of intergovernmental tax immunity, as codified in 4 U.S.C. § 111, for retired military members—is vitally important to *amici*. If the decision below is permitted to stand, military retirees and, indeed, military members on active duty throughout the fifty states will be at risk that rights established by Congress may be arbitrarily abridged by any state court solely on the basis of its facile interpretation of federal law. *Amici* have supported the enactment of several measures by Congress which prohibit discrimination of the type upheld by the decision below. These enactments will soon become empty promises unless this Court makes clear that once it "has spoken, it is the duty of [all] courts to respect that understanding of the governing rule of law." *Rivers v. Roadway Express, Inc.*, 114 S. Ct. 1510, 1519 (1994). Thus, *amici* have a unique perspective on the question presented by this case as well as a vital interest in its proper resolution.

REASONS FOR GRANTING THE WRIT

The decision of the Supreme Judicial Court of Massachusetts presents a question of far-reaching importance: whether a state court is free to ignore the decisions of this Court construing the rule of nondiscrimination under the constitutional doctrine of intergovernmental tax immunity, as codified in 4 U.S.C. § 111, for retired members of the armed forces? *Amici* respectfully submit that this Court should grant the petition in this case to correct the erroneous result of the court below on an issue involving the important concern of national defense. *See* U.S. Const. art. I, § 8, cls. 12, 13, 14. If there should be any doubt as to the need for certiorari, *amici* request that the Court seek the views of the Solicitor General of the United States because of the important federal interests implicated in the decision below.[3]

The decision of the Supreme Judicial Court of Massachusetts conflicts with the holdings of the Court in *Baker v. Kansas*, 503 U.S. 594 (1992); *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989), and *Phillips Chem. Co. v. Dumas Indep. Sch. Dist.*, 361 U.S. 376 (1960). In addition, it "conflicts with decisions of other state courts of last resort." *Baker*, 503 U.S. at 597 n.3. If permitted to stand, the result in this case will be an invitation to the states to eviscerate the holdings of the Court's decisions and render the doctrine of intergovernmental tax immunity meaningless.

In *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989), this Court construed the "plain language" of 4 U.S.C. § 111 and concluded that the "statute leaves no room for doubt" that federal retirement benefits "are sub-

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[3] In *Filios v. Commissioner*, No. 93-1145, the Solicitor General urged the Court to grant the petition if it were timely. Upon subsequent briefing, at the request of the Court, it appears that the Court concluded that the *Filios* peition was untimely. This case presents the same important federal question that was never reached in *Filios*.

ject to § 111." *Id.* at 808. In resolving the question of the validity of the Michigan Income Tax Act, the Court held that "the relevant inquiry is whether the inconsistent tax treatment is *directly related to*, and *justified* by, 'significant differences between the two classes.'" *Id.* at 816 (emphasis added) (citation omitted). However, in resolving the issue of whether Massachusetts may discriminate in favor of its own retirees and against military retirees, the court below ignored the nondiscrimination principle of *Davis*. *See Cooper v. Commissioner of Revenue*, 421 Mass. 557, 562, 658 N.E.2d 963 (1995), *petition for cert. filed*, 64 U.S.L.W. 3669 (U.S. Mar. 25, 1996) (No. 95-1542).

As to military retirees, Massachusetts' discriminatory scheme in operative effective is indistinguishable from the scheme addressed by this Court in *Barker v. Kansas*, 503 U.S. 594 (1992). As in Kansas, Massachusetts "taxes the benefits received from the United States by military retirees but does not tax the benefits received by retired state and local government employees." *Id.* at 596.[4] However, neither the lower courts' opinion nor the position of the State demonstrates how the differential treatment of military retirees—both facially and in effect—is "based on" the alleged differences between the two classes. *See Phillips Chemical Co. v. Dumas Indep. Sch. Dist.*, 361 U.S. 376, 384 (1960); *Davis*, 489 U.S. at 816-17. The only distinguishing factor set forth in Massachusetts' ex-

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[4] Similar to Kansas, Massachusetts has a "piggyback" system of taxation which adopts federal gross income as its starting point. General Laws C.62, § 2. Pension income is included in federal gross income. 26 U.S.C. §§ 61(a)(9) and (11). However, the State wholly exempts from this tax any "[i]ncome from any contributory annuity, pension, endowment or retirement fund of the United States government or the commonwealth or any political subdivision thereof, to which the employee has contributed." General Laws C.62, § 2(a)(2)(E). Payments received by persons who participated in the pre-1938 noncontributory retirement system for state and local police and firemen are also exempt from the Massachusetts income tax. 1973 Mass. Acts, ch. 876.

emption provisions is the source of the compensation. There is no evidence of any kind which establishes that the Massachusetts legislature intended to single out military retired pay for discrimination because of any actual or perceived differences from other forms of retirement income. The court below based its decision *solely* on the *post hoc* rationalization of the respondent. *See* T.I.R. 1992-3, App. D. 15a-18a. However, such a rationalization is legally insufficient to permit a state to discriminate against military retired pay.

The court below held that Massachusetts' discriminatory scheme did not violate 4 U.S.C. § 111 because of the noncontributory nature of the military retirement system.[5] In so holding, it simply adopted the position of the respondent that the discriminatory tax treatment of retirement benefits was dependent on "whether the retirement fund is a 'contributory fund to which the employee has contributed.'" *Cooper*, 421 Mass. at 559 (citations omitted). This conclusion is "unpersuasive." *Barker*, 503 U.S. at 603.

Under the current, contributory retirement system for state and local employees in Massachusetts, 90% of the retirement benefits are funded exclusively from government employer contributions. *See, e.g., Filios v. Commissioner of Revenue*, 415 Mass. 806, 811, 615 N.E.2d 933 (1993), *cert. denied*, 114 S. Ct. 1538 (1994); Pet. at 12.[6] Beginning in 1987, the so-called employee's contribution of the other 10%, representing the employee's "annuity savings fund," is paid as well by the state and local government employer units. General Laws C.32,

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[5] As the Solicitor General poignantly noted in *Barker*, Congress' decision to fund military retired pay out of general revenues rather than annual contributions "is no concern of state tax policy . . . ." *See Brief* For The United States As Amicus Curiae In Support Of Petitioners, at 23 n.34, *Barker v. Kansas*, No. 91-611 (1992).

[6] The other exempt state pension plan is noncontributory. *See* n.4, *supra*.

§ 22(10). *See also* Pet. at 11-12. Yet, the exemption provided state and local retirees is unlimited.

In addition, the court's conclusion that all members of the favored state class are "required to make regular, State-taxed, contributions" is erroneous. *Cooper*, 421 Mass. at 560. Under the discriminatory scheme in issue, many members of the favored state and local class of retirees were never subject to tax at all at the time their contributions were made. *See, e.g.*, Letter Ruling 1987-8, App. C, 11a-14a.[7] Similarly, many of the other remaining members of the favored states and local class have likewise never been subject to tax on their contributions. Massachusetts provides a current deduction for tax purposes of $2,000 for *employee* contributions to contributory pension plans. *See* General Laws C.62, § 3(B)(a)(4).[8] The balance of the favored state and local class has similarly paid little or no tax on their contributions.

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[7] In addition, Massachusetts law, in the first instance, provides unlimited protection to prevent the imposition of tax upon retirement benefits attributable to *employee* contributions that have been taxed at the time of contribution. For example, the instructions to the 1993 Massachusetts Resident Income Tax Form 1 provide at 8 that pensioners are to "[s]ubtract from [their taxable] income the amount of [their] contributions which were previously taxed by Massachusetts until the total of [their] taxed contributions are received." App. E, 19a. Thus, it is clear that the state's proffered rationale for the source based discrimination at issue in this case does not exist in fact.

[8] The statute provides in relevant part:

> (a) There shall be deducted from the Part B adjusted gross income in determining the Part B taxable income:
>
> * * *
>
> (4) All sums *deducted* from wages as *contributions* to any annuity, pension, endowment or retirement fund of the United States government, the commonwealth or any political subdivision thereof, provided, that the deduction for such contributions and the deductions otherwise allowable under subparagraph (3) hereof attributable to any one taxpayer shall not in the aggregate exceed two thousand dollars . . . .

to the plan by virtue of this same provision. *Id.* And *all* members of the favored state and local class enjoy a *full* exemption from tax on *all* of their retirement benefits.

Morever, if there were any doubt as to the source based discrimination of Massachusetts' scheme, it is readily demonstrated by the scheme's operative effect as to retirees of states other than Massachusetts. Retirees of other states' public employee retirement systems are entitled to the discriminatory exemption, not based on whether their contributions were previously taxed by either Massachusetts or their former state, but *solely* on the source of the payor state. If the payor state exempts Massachusetts' public employee retirement income from taxation, then the payor state's public employee retirement income is exempt in Massachusetts. *See* Technical Information Release 1995-9, App. B, 7a-10a. On the other hand, if the other state does not exempt Massachusetts public employee retirement income, then the other state's public employee retirement income is taxed in Massachusetts, irrespective of whether there has been prior taxation of the *employee* contribution. *Id.*

The decision below is in irreconcilable conflict with the Court's decision in *Davis*. Ninety percent of Massachusetts retirement benefits are funded exclusively through government *employer* contributions and the earnings on those *employer* contributions. *See, e.g.*, Pet. at 11-13. Yet, Massachusetts does not tax, at *any* time, these *employer* contributions and earnings on *employer* contributions. However, the court below justified the State's taxation on the *full* measure of military retired pay on the basis that *part* of the benefits received by state and local employees—the sum attributable to *employee* contributions—had been previously taxed. *Cooper*, 421 Mass. at 557.[9] *See also* Technical Information Release 1992-3, App. D, 17a.

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[9] Of course, as demonstrated above, the court's conclusion that *employee* contributions have been *fully* taxed at the time of con-

Examining Massachusetts' scheme, it is clear that the "State's articulated rationale is not in fact the basis for the disparate treatment, but only a cloak for discrimination against federally funded benefits." *Barker*, 503 U.S. at 604-05 (1992) (citation omitted). As this Court recognized in *Davis*, a "tax exemption truly intended to account for differences in [the taxation for the funding of] retirement benefits would not discriminate on the basis of the source of those benefits, as [Massachusetts'] statute does; rather it would discriminate on the basis of the amount of benefit received by individual retirees [which were previously taxed]." *Davis*, 489 U.S. at 817. Accordingly, for purposes of 4 U.S.C. § 111, it is obvious that Massachusetts' proffered rationale fails "because an evenhanded application of the rationale would have resulted in inclusion of [all state retirees] in the disfavored class." *Id.*

Under the doctrine of intergovernmental tax immunity, "the State [must] treat those who deal with the Government as well as it treats those with whom it deals itself." *Phillips Chemical Co. v. Dumas Indep. Sch. Dist.*, 361 U.S. 376, 385 (1960). Consistent with this doctrine, 4 U.S.C. § 111 prohibits the discriminatory state taxation of "salaries, retirement benefits, and other forms of compensation . . . on account of the source of the compensation." *Davis*, 489 U.S. at 810. Nothing in the doctrine of intergovernmental tax immunity or the statute differentiates between military retirees and other retired employees. *Barker v. Kansas*, 503 U.S. 594 (1992).

As this Court recognized in *Davis*, "[t]he danger that a State is engaging in impermissible discrimination against the Federal Government is greatest when the State acts to benefit itself and those in privity with it." *Davis*, 489 U.S. at 815 n.4. In the instant case, the court below acted impermissibly when it failed to scru-

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tribution is plainly erroneous. *See, e.g.*, Letter Ruling 1978-8, *supra*; General Laws C.62, § 8(B)(a)(4), *supra*, n.8.

tinize the respondent's *post hoc* rationalization for the discrimination.

Because of the Eleventh Amendment and the Tax Injunction Act, 28 U.S.C. § 1341, taxpayers, such as the petitioners, are relegated exclusively to state courts to press their claims for relief. But it is state courts that have demonstrated the greatest difficulty in recognizing this Court's decisions as the "controlling statement of federal law." *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993). This Court is the only federal court that can hear the retirees' claims. Review by this Court is thus necessary to assure a correct and evenhanded application of this Court's decisions. Absent review by this Court, "[t]he State too easily avoids its responsibilities . . . [for its] noncompliance with federal law." *Green v. Mansour*, 474 U.S. 64, 81 (1985) (Blackmun, J., dissenting).

CONCLUSION

Contrary to the decisions of this Court in *Phillips*, *Davis*, and *Barker*, the court below utilized a "cloak for discrimination," *Barker*, 503 U.S. at 604, to justify a result which violates the express will of Congress. *Amici* respectfully urge that the petition for a writ of certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts should be granted and that the decision below should be reversed.

Respectfully submitted,

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April 23, 1996

APPENDICES

APPENDIX A

The following organizations join in this brief in support of the petition for a writ of certiorari to the Supreme Judicial Court of Massachusetts:

Air Force Association (AFA)

Founded in 1946. Approximately 200,000 members. Membership in AFA is open to anyone who serves or has served in the U.S. Military. Other American citizens may affiliate as patrons. Mission is to provide public understanding of aerospace power, need to support a strong national defense and to represent needs of men and women who serve and have served in USAF.

Army Aviation Association of America (AAAA)

Founded in 1957. Approximately 16,000 members. Membership in AAAA is open to all persons who desire to support the furtherance of U.S. Army Aviation or its allied pursuits.

Association of Military Surgeons of the United States (AMSUS)

Chartered by Congress in 1903. Approximately 13,000 members. Membership is open to past and present commissioned officers or GS-9 and above civilians in the Federal Health Agencies including USA, USAR, USN, USNR, USAF, USAFR, ARNG, ANG, USPHS, USCG and VA; officers of military medical services of other nations; and past and present medical consultants to the chiefs of the federal medical services. Mission is dedicated to the advancement of all aspects of health care within the Federal Health Agencies.

Association of the U.S. Army (AUSA)

Founded in 1950. Approximately 115,000 individual and 204 industrial members. Membership is open to all

active, reserve and civilian personnel in the Army, and any person subscribing to the association's bylaws. The purpose of the organization is to foster public understanding and support of the Army and the people who serve in it.

Commissioned Officers Association of the U.S. Public Health Service (COA)

Founded 1937. Approximately 6,900 members. Membership is open to active duty, retired, inactive reserve and former commissioned officers of the U.S. Public Health Service. Mission is to protect the interests and welfare of commissioned officers of the PHS.

CW & WO Assn. US Coast Guard

Founded in 1929. Approximately 3,300 members. Membership is open to active duty, reserve and retired Coast Guard warrant and chief warrant officers. The association's purpose is to advance members' professional abilities.

Enlisted Association of the National Guard of the U.S. (EANGUS)

Founded 1970. Approximately 60,000 members. Membership is open to enlisted members of the National Guard through state associations and associate membership is open to all individuals through state associations. The purpose of the association is to promote and maintain adequate national security; and to foster the status, welfare and professionalism of enlisted members of the National Guard.

Fleet Reserve Association (FRA)

Chartered November 11, 1924. Over 160,000 members plus 20,000 member Ladies Auxiliary. Membership is open to active duty, drilling reserve, and retired enlisted personnel and commissioned officers with prior enlisted

service in the Navy, Marine Corps and Coast Guard. Mission is to represent its members on military compensation, benefits and entitlements legislation before the Congress.

Jewish War Veterans of the USA

Founded in 1896. Approximately 100,000 members. Membership is open to veterans of wartime service of the Jewish faith. The organization's mission is service to veterans, Americanism, and to provide a voice on the Hill for veterans' legislation and benefits.

Marine Corps League (MCL)

Founded in 1923. Approximately 45,000 members. Membership is open to those who served in the Marine Corps. The organization's mission is to preserve the traditions, to promote the interests of the Marine Corps, to voluntarily aid and render assistance to all Marines and former Marines, as well as to their widows and orphans.

Marine Corps Reserve Officers Association (MCROA)

Founded in 1928. Approximately 5,500 members. Membership is open to all Marine officers and officers of other U.S. services who served with Marines. The association's mission is to support and strengthen the Marine Corps, its reserve and reserve officers.

Military Chaplains Association of the USA (MCA)

Founded in 1925 and chartered by Congress in 1950. Approximately 1,600 members. Membership is open to all chaplains of the Army, Navy, Air Force, VA and Civil Air Patrol, active duty, reserve, retired and former. The organization's mission is to safeguard and strengthen the forces of faith and morality of our nation; to perpetuate and to deepen the bonds of understanding and friendship in our military services; to preserve spiritual influence and interest in all members and veterans of the armed forces;

to uphold the Constitution of the United States; and to promote justice, peace and goodwill.

National Guard Association of the United States (NGAUS)

Founded in 1878. Approximately 58,000 members. Membership is open to all present and former officers of the Army and Air National Guard, corporate and individual associate membership. The association's mission is to improve the readiness of the National Guard and to provide personnel benefits and entitlements for the half million members of the National Guard.

National Military Family Association (NMFA)

Founded in 1969. Approximately 10,000 family members. Membership is open to active duty, retired and reserve component members of the seven uniformed services and their family members and survivors. NMFA's mission is to serve military and other uniformed service families through education, information and advocacy.

National Order of The Battlefield Commissions (NOBC)

Founded 1978. Approximately 1,000 members. Membership is open to any individual of any service who has been Commissioned in the Armed Forces of the United States as a result of combat action. Mission is to support a strong and responsive national defense by supporting those Americans that follow our flag.

Naval Enlisted Reserve Association (NERA)

Founded in 1957. Approximately 15,000 members. Membership in NERA is open to active and retired enlisted reservists in the Coast Guard, Marine Corps and Navy and to all other interested citizens. NERA is dedicated to promoting and maintaining career service in the Sea Service Reserve.

Navy League of the United States (NLUS)

Founded in 1902. Approximately 68,000 members. Membership is open to civilians, military reservists and retirees. The League's mission is to maintain a strong U.S. maritime posture through support of the Navy, Marine Corps, Coast Guard and Merchant Marine.

Reserve Officers Association (ROA)

Organized in 1922, and chartered by Congress in June 1950. Approximately 100,000 members. Originally, the Reserve Officers Association consisted solely of Army officers, Reserve officers, National Guard officers, and retired officers. Following World War II, the Reserve Officers Association expanded its membership to all services.

The Retired Enlisted Association (TREA)

Founded in 1963 and chartered by Congress. Approximately 77,000 members. Membership open to enlisted retirees from all branches of the service, their surviving spouses and active duty members with over 20 years of service. Mission is to protect earned benefits of retired and career enlisted and their families.

The Retired Officers Association (TROA)

Founded in 1929. Approximately 400,000 members. Membership in TROA is open to all past and present, active, reserve and retired commissioned and warrant officers in any of the seven uniformed services and their survivors. TROA's mission is to support a strong national defense and to represent its members' interests before Congress.

United Armed Forces Association (UAFA)

Founded in 1987. Approximately 18,000 members. Membership is open to E-1 through O-10, Active Duty,

Retired, Reserve, National Guard, Veterans of all five uniformed military services. Mission is to represent the members of the Armed Forces before Congress on legislative matter affecting them.

U.S. Army Warrant Officers Association (USAWO)

Founded 1973. Approximately 5,000 members. Membership is open to active duty, National Guard, reserve and retired Army warrant officers. Mission is to recommend improvement of the Army and to promote technical and professional information among warrant officers.

U.S. Coast Guard Chief Petty Officers Association (CPOA)

Founded in 1969. Its 10,000 members are active, retired, and reserve Coast Guard chief petty officers. The mission of the Association is to promote the welfare of chief petty officers, to promote and protect the rights and benefits of all armed forces personnel and aid in Coast Guard recruiting.

APPENDIX B

MASSACHUSETTS TECHNICAL INFORMATION RELEASE 95-9 JANUARY 31, 1996

Income Taxation of Contributory Public Employee Pensions of Other States

Introduction

This Technical Information Release announces the Department of Revenue's decision to acquiesce in the Appellate Tax Board's ruling in *Pariser v. Commissioner of Revenue*, A.T.B. Docket No. 215394 (March 1995) to the extent of the facts in the case.

Department's Position Prior to *Pariser*

Massachusetts General Laws chapter 62, section 3(B)(a)(4) provides a deduction from Massachusetts adjusted gross income of:

> any income from a contributory annuity, pension, endowment or retirement fund of any other state or any political subdivision thereof, provided that income from any such similar fund established under the laws of the commonwealth is not subject to taxation in such other state or political subdivision.

Id. Thus, in general, a deduction is available to a Massachusetts resident who receives a contributory public pension from another state if the other state grants reciprocal treatment to retirees from Massachusetts. Before *Pariser*, the Department concluded that unless another state provides a blanket exemption for all Massachusetts contributory public employee pension income, there is no reciprocity, and income from a contributory public employee retirement plan of that state received by a Massachusetts resident may not be deducted from Massachusetts adjusted gross income. See Letter Ruling 81-91 and 85-12 which discussed income received from a New York State contributory public employee pension fund.

Section 617(c)(3-a) of the New York State Personal Income Tax Law permits New York residents to deduct from gross income:

> Pensions and annuities received by an individual who has attained the age of fifty-nine and one-half, . . . to the extent includible in gross income for federal income tax purposes, but not in excess of twenty thousand dollars.

Id. Under this provision, New York still taxes income from Massachusetts contributory public employee retirement plans when the taxpayer is younger than 59 and one-half years old or to the extent pension income exceeds $20,000. In Letter Rulings 81-91 and 85-12 the Department held that because section 617(c)(3-a) of the New York State Personal Income Tax Law did not provide a blanket exemption for all Massachusetts contributory public employee pension income, a Massachusetts resident who receives income from a New York State contributory public employee pension fund was not entitled to a deduction pursuant to M.G.L. c. 62, § 3(B)(a)(4) for that income.

ATB Decision in *Pariser*

In *Pariser*, the taxpayer, a Massachusetts resident appealed the Department's denial of his request for an abatement of tax paid on $11,322.00 of income received from a New York State contributory pension. The Appellate Tax Board ruled that M.G.L. c. 52, § 3(B)(a)(4) does not require that another state provide a blanket exemption for all Massachusetts pension income. The Board stated that the focus was on whether the taxpayer would have been taxed in the payor state if he were a resident of that state and the income had been paid by a Massachusetts pension, if not, his pension income from the payor state is not taxable in Massachusetts. Since Mr. Pariser was over 59½ years of age and the pension income was less than $20,000, he would not be taxed in

New York on pension income paid by a similar Massachusetts pension fund. Thus, his pension income from New York was not taxable in Massachusetts.

Department's Position After *Pariser*

The Department of Revenue acquiesces in the ATB's decision in *Pariser* to the extent of the facts in the case. The Department will no longer require that the laws of another state provide a blanket exemption for all Massachusetts pension income before recognizing such laws to be reciprocal. A Massachusetts resident will be allowed a deduction for income received from a contributory annuity, pension, endowment or retirement fund of another state or its political subdivisions if:

(1) that other state has a specific income exclusion for pension income which applies to Massachusetts state or local contributory public employee pension plans; or

(2) that other state has a specific deduction or exemption for pension income which applies to Massachusetts state or local contributory public employee pension plans; or

(3) that other state has no income tax.

The amount of the deduction allowed pursuant to M.G.L. c. 62, § 3(B)(a)(4) for income received by a Massachusetts resident from a contributory public employee annuity, pension, endowment or retirement fund of another state will equal the amount of the specific pension exclusion, deduction, or exemption that could be claimed by the taxpayer under the laws of the other state if the taxpayer were a resident of the other state and received the income from a Massachusetts state or local contributory pension. In the case of a state that has no income tax, all income from qualifying pensions of the other state or its subdivisions may be deducted under M.G.L. c. 62, § 3(B)(a)(4).

The following examples illustrate the rules announced in this TIR:

Example 1: A Massachusetts resident who is 62 years old receives $25,000 of pension income from a New York State contributory public employee pension fund. As set out above, New York allows a deduction for pension income provided the recipient is 59½ years old or older and the deduction is not in excess of $20,000. The Massachusetts resident is allowed a deduction in the amount of $20,000 for the New York Pension income.

Example 2: A Massachusetts resident who is 55 years old receives $25,000 of pension income from a New York State contributory public employee pension fund. The taxpayer, who is not 59½ years old or older, is not allowed a deduction for any of the New York pension income.

Example 3: State A has a personal income tax with a standard personal exemption of $10,000 applicable to any type of income, but no specific exclusion, deduction or exemption related to pension income. A Massachusetts resident receives $20,000 in gross income, including $15,000 in pension income from a contributory public employee pension fund in State A. No part of the $15,000 of pension income is deductible under M.G.L. c. 62, § 3(B)(a)(4) because the $10,000 personal exemption in State A is not specifically related to pension income.

This TIR revokes Letter Rulings 81-91 and 85-12 and Technical Information Releases 80-4 and 89-10.

APPENDIX C

Massachusetts Letter Ruling 1987-8
December 1, 1987

You have requested a letter ruling on behalf of the * * * (Authority), a political subdivision of the Commonwealth, on the Massachusetts tax consequences to Authority employees of a recent change to the Authority's retirement plan. The facts as you have explained them to us are as follows.

Facts

The Authority retirement plan requires Authority employees to contribute 4% of their salaries annually to the retirement fund. Contributions are deducted from employees' salaries and paid directly into the fund. Generally, the Internal Revenue Code treats such contributions as having been made by the employee, which meant that they were part of each Authority employee's federal gross income for the year.

In February 1988, however, the Authority amended its plan by adopting the "pick-up" provision of Code § 414 (h)(2). In doing so, the Authority stated that the picked-up contributions "shall, as permitted by IRC Section 414(h)(2), be considered employee contributions for all purposes of the Fund and included as employee compensation as defined by the Plan (Pension Agreement, Art. V, § 3(c)). Code § 414(h)(2) provides that

> in the case of any plan established by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing, where the contributions of employing units are designated as employee contributions but where any employing unit picks up the contributions, the contributions so picked up shall be treated as employer contributions.

The effect of Code § 414(h)(2) is to exclude the employee pension contributions that the Authority has "picked up" from the employees' federal gross income and from withholding requirements. *See* Rev. Rul. 77-462. When an employee receives amounts from the fund upon retirement, however, those amounts are taxable for federal income tax purposes. *See id.*

Discussion

The change to the Authority's retirement fund raises two Massachusetts tax questions: (1) how the picked-up contributions will be treated under G. L. c. 62; and (2) how payments to a retiree will be treated under G. L. c. 62. We conclude that: (1) an Authority employee is not required to include the retirement fund contributions picked up by the Authority as part of Massachusetts gross income; and (2) a retired Authority employee may exclude from Massachusetts gross income amounts received from the retirement fund.

A. *Contribution to the Fund*

The Massachusetts personal income tax statute, G. L. c. 62, imposes a tax on a taxpayer's Massachusetts gross income, which, the statute specifies, is the taxpayer's federal gross income, with certain items added thereto and other items excluded therefrom not here relevant. G. L. c. 62, § 2(a). Under Code § 414(h)(2), an Authority employee excludes retirement fund contributions picked up by the Authority from federal gross income. As a result, the employee will also exclude those contributions for Massachusetts tax purposes, unless one of the provisions of G. L. c. 62, § 2(a), requires the employees to add such contributions to federal gross income. There is no such requirement in G. L. c. 62. The picked-up retirement fund contributions are therefore not included in an employee's Massachusetts gross income. (Since the contributions are not included in gross income, employees

may not deduct them from income under G. L. c. 62, § 3(B)(a)(4).)

B. *Benefits Received from the Fund*

On the other hand, amounts received by a retired Authority employee from the retirement fund are included in federal gross income. Code § 61(a)(11). They will therefore also be taxable for Massachusetts purposes unless a specific provision of G. L. c. 62 excludes them. Section 2(a)(2)(E) of G. L. c. 62 provides that a taxpayer may exclude from Massachusetts gross income "[i]ncome from any contributory annuity, pension, endowment or retirement fund of the United States government or the commonwealth or any political subdivision thereof, to which the employee has contributed." See also G. L. c. 62, § 3(B)(a)(4). We conclude that the Authority's retirement fund is one "to which the employee has contributed" and, as a result, that the benefits Authority employees will receive from the fund when they retire are exempt from Massachusetts taxation.

Analyses of both the practical aspects of the plan as amended and the statutory language of the applicable provisions of G. L. c. 62 support this conclusion. First, the change to the Authority's retirement plan alters the substance of the pension arrangement with the Authority's employee in only one way; now, the contribution each employee must make to the fund is not taxable to the employee. The amount of the contribution, representing a percentage of the employee's total salary, remains the same as before the Authority amended its plan. The pension benefits the employee will be entitled to receive, based on the employee's salary history over the course of his or her employment, remain the same. Moreover, the amount an employee must contribute under the Federal Insurance Contributions Act (Code § 3101 *et seq.*), also based on the employee's total salary, remains the same. The retirement fund contributions thus may be said to come from the employees despite the fact that

the contributions are not taxed to the employees as a result of Code § 414(h)(2). Second, there is no requirement in G. L. c. 62 that the exclusion of retirement benefits from taxable income under G. L. c. 62, § 2(a)(2)(E) and § 3(B)(a)(4) apply only to retirement plans that were subject to the $2,000 limit on non-taxable contributions under G. L. c. 62, § 3(B)(a)(4).

APPENDIX D

Massachusetts Technical Information Release 1992-3
April 28, 1992

I. Summary

This Technical Information Release (TIR) explains the Massachusetts income tax treatment of U.S. military retirement benefits in light of the U.S. Supreme Court decision in *Barker v. Kansas,* 60 U.S.L.W. 4322 (April 21, 1992). The TIR concludes that the *Barker* decision does not negate the validity of the distinction between contributory and non-contributory public retirement plans under G.L. c. 62, § 2(a)(2)(E). Therefore, payments from non-contributory public retirement plans, generally including military retirement benefits, remain subject to the Massachusetts personal income tax.

II. Discussion

A. Federal Law

Under the Public Salary Act of 1939, 4 U.S.C. § 111, the United States permits individual states to tax the pay of federal officers and employees, provided that the tax does not discriminate against the officers or employees because of the source of their pay.[1] The Supreme Court has held that preferential tax treatment of retirement income paid to former state and local government employees, based on the source of that income, violates 4 U.S.C. § 111 when it is not extended to federal retirees.

---

[1] 4 U.S.C. § 111 provides as follows: The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States, a territory or possession or political subdivision thereof, the government of the District of Columbia, or an agency or instrumentality of one or more of the foregoing, by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation.

Davis v. Michigan Department of the Treasury, 489 U.S. 803 (1989).

Recently, the U.S. Supreme Court in *Barker v. Kansas,* 60 U.S.L.W. 4322 (April 21, 1992) decided that the state of Kansas discriminated against federal employees in violation of 4 U.S.C. § 111 when it taxed the retirement benefits of military retirees while exempting from tax the retirement benefits of former state employees. Because military "retirees" remain members of the U.S. armed forces and are subject to military justice, to restrictions on civilian employment, and to recall for active service, Kansas had attempted to justify its disparate tax treatment of payments to military retirees and state retirees by describing payments to military retirees as current reduced payments for current services, as opposed to the deferred compensation received by former state employees for past services. The Supreme Court rejected this distinction because payments to a military retiree are based on the retiree's rank and length of service and, in fact, resemble deferred compensation for services previously provided. The Court concluded that Kansas had violated 4 U.S.C. § 111 because its inconsistent tax treatment of state and federal retirees was not "directly related to, and justified by, significant differences between the two classes" of retirees. *Barker,* 60 U.S.L.W. 4322 at ——.

B. Massachusetts Statutes

Massachusetts generally imposes an income tax on the Massachusetts gross income of residents with certain deductions and exclusions, G.L. c. 62. Massachusetts gross income is defined as federal gross income with Massachusetts modifications. G.L. c. 62, § 2. One of these modifications excludes "[i]ncome from any contributory annuity, pension, endowment or retirement fund of the United States government or the commonwealth or any

political subdivision thereof, to which the employee has contributed," G.L. c. 62, § 2(a)(2)(E). See also G.L. c. 62, § 3(b)(a)(4). Under the terms of this statute, either state or federal pension payments are exempt from Massachusetts income tax if the pension funds are contributory. Military retirement benefits generally are subject to Massachusetts income tax because the military retirement system is not a contributory retirement plan. See Technical Information Release 89-6; Letter Ruling 89-1.

C. Barker Decision Does Not Invalidate Massachusetts Law.

In *Barker,* the Supreme Court has recognized that state taxing systems do not necessarily violate 4 U.S.C. § 111 merely because they impose tax on the income of federal employees while exempting from tax the income of state employees. Rather, the Court stated that "we evaluate a state tax that is allegd to discriminate against federal employees in favor of state employees by inquiring 'whether the inconsistent tax treatment is directly related to, and justified by, significant differences between the two classes.'" *Barker,* 60 U.S.L.W. 4322, at ——. Thus, significant differences between classes of federal and state employees may justify different tax treatment of the incomes of those classes of employees.

Massachusetts law does not violate 4 U.S.C. § 111 because it does not discriminate against federal retirees on the basis of the source of their pay. See TIR 89-6 (responding to the *Davis* decision). The significant distinctions between the structures of contributory retirement plans and non-contributory plans directly relate to and justify the difference in tax treatment of distributions from these plans. A contributory pension is one in which amounts contributed to the plan are includible in the Massachusetts gross income of the employee (or would be included in the Massachusetts gross income of the

employee if the employee were a Massachusetts resident). Under a non-contributory plan, amounts contributed on behalf of an employee are not included in the gross income of the employee and are therefore not subject to tax at the time of contribution. Thus, taxing distributions from contributory plans can lead to double taxation, while tax ing distributions from non-contributory plans will not.

The Supreme Court in *Barker* specifically refrained from invalidating different tax treatment of payments from contributory and non-contributory plans. *Barker*, 60 U.S.L.W. 4322, at —— n. 5. Consequently, the *Barker* decision does not alter the non-discriminatory distinction between payments from these plans currently found in Massachusetts law.

APPENDIX E

EXCERPT FROM 1993 MASSACHUSETTS RESIDENT INCOME TAX FORM 1— ALL SCHEDULES AND INSTRUCTIONS

Item 3

Taxable Pensions and Annuities

Income from most private pensions or annuity plans is taxable in Massachusetts. Certain government pensions, however, are exempt under Massachusetts law. In general, exempt pensions include contributory pensions from the U.S. Government or the Commonwealth of Massachusetts and its political subdivisions. Noncontributory military pensions are taxable in Massachusetts. The following section describes some specific pensions which are exempt. If your pension is exempt, enter "0" in Item 3 and note the source of the pension in the margin. For more information, refer to Technical Information Release (TIR) 89-6 or 92-3.

If your pension is not exempt, you should generally enter in Item 3 the taxable amount reported on your U.S. Form 1040A, line 11b, or U.S. Form 1040, line 17b. In some cases, however, Massachusetts law requires an adjustment to the federal amount. Distributions from annuity, stock bonus, pension, profit-sharing or deferred payment plans or contracts described in Sections 403(b) and 404 of the U.S. IRC must be adjusted to account for your contributions that have been previously taxed. Subtract from such income (as reported on your U.S. Form 1040A, line 11a, or U.S. Form 1040, line 17a) the amount of your contributions which were previously taxed by Massachusetts until the total of your taxed contributions is received. If your pension falls into this category, enter the adjusted amount in Item 3 and explain briefly (in an attached statement) why this amount is different than the amount

reported on your U.S. return. If you are receiving distributions from an IRA or Keogh plan, do not report the income here; instead, please refer to the instructions for Item 10.

(4)

No. 95-1542

Supreme Court, U.S.
FILED
APR 24 1996
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995.

LELAND A. COOPER, ET AL.,
Petitioners,

v.

COMMISSIONER OF REVENUE
OF MASSACHUSETTS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

RESPONDENT'S BRIEF IN OPPOSITION

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30 pp

QUESTION PRESENTED

Does a State violate 4 U.S.C. § 111 (1994)(prohibiting discriminatory taxation of federal officers and employees), when it taxes income received from state, local and federal non-contributory pensions, and exempts only contributory state, local and federal pensions?

Table of Contents

QUESTION PRESENTED

TABLE OF AUTHORITIES ii

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT 3

Statement of Facts 4

SUMMARY OF REASONS FOR DENYING PETITION 9

REASONS FOR DENYING PETITION 11

I. The Commonwealth's Tax Statutes Conform to the Federal Anti-discrimination Statute. 12

II. Petitioners' Attacks on the Massachusetts Tax System Do Not Involve Questions of National Importance and Raise Issues of State Law. 17

CONCLUSION 23

Table of Authorities

Cases

Alarid v. Sec. of N.M. Dept.
of Tax. and Rev.,
118 N.M. 23, 878 P.2d 341
(Ct. App.),cert. denied,
118 N.M. 90, 879 P.2d 91 (N.M. 1994)
cert. denied, 115 S. Ct. 733 (1995) 12n

Barker v. Kansas,
503 U.S. 594 (1992) 13, 14

Brown v. Mierke,
443 S.E.2d 462 (W. Va.)
cert. denied sub nom.,
Brown v. Paige,
115 S.Ct. 207 (1994) 12n

Davis v. Michigan Department of the Treasury,
489 U.S. 803 (1989) 6, 13, 14

Department of Revenue of Oregon v.
ACF Industries, Inc.,
114 S.Ct. 843 (1994) 16

Doneski v. Comptroller of the Treasury,
91 Md. App. 614, 605 A.2d 669 (1991),
cert. denied, 327 Md. 523, 610 A.2d 796
(1992), cert. denied, 506 U.S 1054 (1993) 16

Filios v. Commissioner of Revenue,
415 Mass. 806, 615 N.E.2d 933,
cert. denied, 114 S.Ct. 1538 (1994) 5, 6, 7, 8, 22

Hogan v. United States,
513 F.2d 170, (6th Cir.),
cert. denied, 423 U.S. 836 (1975) 18n

Howell v. United States,
775 F.2d 887 (7th Cir. 1985) 9n

Mathews v. Eldridge,
424 U.S. 319 (1976) 22

In Re Woods,
143 U.S. 202 (1892) 11

Weinberger v. Salfi,
422 U.S. 749 (1975) 22

Werner Machine Co., Inc. v.
Director of Division of Taxation,
350 U.S. 492 (1956) 16

Witte v. Director of Revenue,
829 S.W.2d 436 (Mo. En Banc 1992) 12n

United States v. City of Detroit,
355 U.S. 466 (1958) 13

Federal Statutes

4 U.S.C. § 111 (1994)	passim
26 U.S.C. § 414(h)(2)	8n
28 U.S.C. § 1257	2
29 U.S.C. § 1054(c)	18
29 U.S.C. § 1056(c)	18

Massachusetts Statutes

M.G.L.A. c. 32, § 22(10)(West 1989)	8n
M.G.L.A. c. 58A, § 7 (West 1988)	5
M.G.L.A. c. 62 (West 1988)	6
M.G.L.A. c. 62, § 2(a)(West 1988)	2
M.G.L.A. c. 62, § 2(a)(1)(I)(West 1988)	8n, 14, 19
M.G.L.A. c. 62, § 2(a)(2)(E)(West 1988)	3, 6
M.G.L.A. c. 62, § 3.B(a)(4)(West 1988)	14
M.G.L.A. c. 62C, § 37 (West 1988)	5
M.G.L.A. c. 62C, § 39 (West 1988)	5

Mass. St. c. 876, § 1 20

Massachusetts Regulations

830 C.M.R. § 62C.3.1(7)(1993 ed.) 6

Miscellaneous

2 Official Mass. Tax Guide (West 1996) 6, 7, 14

Black's Law Dictionary (6th ed.) 18

Canan, Qualified Retirement and Other Employee Benefit Plans (West 1992) 18

Mass. Letter Ruling 89-1 6, 14

U.S. Supreme Court Rule 10 11

U.S. Supreme Court Rule 15 1

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

LELAND COOPER, et al.,
Petitioners,

v.

COMMISSIONER OF REVENUE
OF MASSACHUSETTS,
Respondent.

On Petition For A Writ of
Certiorari To The Supreme Judicial
Court of Massachusetts

RESPONDENT'S BRIEF IN OPPOSITION

Pursuant to United States Supreme Court Rule 15, the Commissioner of Revenue of Massachusetts submits this brief in opposition to the petition for a writ of certiorari filed by Leland Cooper, et al.

JURISDICTION

Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257, to review a final judgment of the Massachusetts Supreme Judicial Court dated December 26, 1995.

STATUTORY PROVISIONS INVOLVED

In addition to 4 U.S.C. § 111, quoted in the petition for a writ of certiorari at 2, the following sections of the Massachusetts General Laws are involved:

> Mass. Gen. Laws Ann. c. 62, § 2(a)(West 1988):
>
> Massachusetts gross income shall mean the federal gross income. . . . with the following further modifications:--
>
> (1) The items to be added thereto are:--

* * *

> (I) Amounts contributed on behalf of the taxpayer pursuant to [the state and municipal pension statute], subdivision (10) of section twenty-two of chapter thirty-two or pursuant to [the judges retirement statute], paragraph (I) of section sixty-five D of said chapter thirty-two and not included in the federal gross income. . . .
>
> (2) The items to be deducted therefrom are:--
>
> * * *
>
> (E) Income from any contributory annuity, pension, endowment, or retirement fund of the United States government or the commonwealth or any political subdivision thereof, to which the employee has contributed.

STATEMENT

Massachusetts General Laws c. 62, § 2(a)(2)(E) exempts from the Massachusetts income tax "[i]ncome from any contributory annuity, pension, endowment or retirement fund of the United States government or the Commonwealth or any political subdivision thereof, to which the employee has contributed." *Id.* (emphasis added). It is undisputed that this

exemption benefits all state and federal retirees who receive income from "contributory" pension funds. Pet. App. A.4. It is also undisputed that the military pensions at issue are not "contributory" pensions. *Id.* The issue in this case is whether the Massachusetts income tax imposed on pensions received by military retirees nevertheless discriminates against federal officers and employees, in violation of 4 U.S.C. § 111.

Statement of Facts

Petitioners ("the taxpayers") are all residents of the Commonwealth who received income from United States military retirement benefits for some or all of the Massachusetts tax years 1986 to 1992. Pet. App. A.4. The taxpayers "are beneficiaries of a 'noncontributory' [retirement] system funded entirely by their employer, the Federal

government." *Id.* All of the taxpayers paid Massachusetts income taxes on their income from their military pensions. *Id.*

The taxpayers filed applications for abatement of income taxes paid during the tax years 1986 through 1992. *Id.*; *see* Mass. Gen. Laws Ann. c. 62C, § 37 (West 1988). The Commissioner denied the abatements. *See id.* The taxpayers appealed to the Massachusetts Appellate Tax Board (the Board). Pet. App. A.1. The Board affirmed the Commissioner. *Id.*; see Mass. Gen. Laws Ann. c. 62C, § 39 (West 1988); c. 58A, § 7 (West 1988). The Board stated that the parties had "raised no issue of law or fact that were not addressed and disposed of by the Supreme Judicial Court in *Filios* v. *Commissioner of Revenue*, 415 Mass. 806, *cert. denied*, 114 S.Ct. 1538 (1994). . . ." Pet. App. A.1. Accordingly, the Board granted the Commissioner's "motion for judgment on the pleadings." *Id.*

The *Filios* case cited by the Board arose as follows. In response to a request for an opinion submitted by various military organizations, the Commissioner issued a ruling on February 16, 1989, that military retirement benefits are taxable income under G.L. c. 62 because they are includable in federal gross income and not "contributory" within the exemption established by G.L. c. 62, § 2(a)(2)(E). Mass. Letter Ruling 89-1, 2 Official Mass. Tax Guide at 765-767 (West 1996).

On March 28, 1989, this Court issued its decision in *Davis* v. *Michigan Department of the Treasury*, 489 U.S. 803 (1989). On May 10, 1989, the Commissioner issued "Technical Information Release 89-6." Pet. App. A.5. See 830 Code of Massachusetts Regulations (C.M.R.) § 62C.3.1(7) (1993 ed.)(Technical Information Releases). The Commissioner opined that "[a]ny federal retirement income is exempt from Massachusetts tax if the system is contributory

and the employee actually contributed." 2 Official Mass. Tax Guide at 384-385 (West 1996).

At various times in late 1989 and 1990, the Commissioner denied each of the applications for abatement filed by the *Filios* plaintiffs. The taxpayers appealed to the Massachusetts Appellate Tax Board, which upheld the Commissioner's decision.

The Supreme Judicial Court affirmed the Board. *Filios* v. *Commissioner of Revenue*, 415 Mass. 806, 615 N.E.2d 933 (1993); Pet. App. A.4. The Court agreed with the Commissioner and the Board that the distinction in Massachusetts tax law between contributory and non-contributory pensions "creates significant differences between the two classes of taxpayers such that differential treatment does not violate 4 U.S.C. § 111." 415 Mass. at 809, 615 N.E.2d at 935. It concluded "that the distinction between contributory and noncontributory pensions systems was a valid

one," which did "not impose the tax based on the source of the income" and was not discriminatory. 415 Mass. at 812, 615 N.E.2d at 936. This Court denied certiorari. 114 S.Ct. 1538 (1994).

The Supreme Judicial Court in this case declined "to overrule *Filios*. . . ." Pet. App. A.4. It held that "Massachusetts tax law distinguishes between contributory and noncontributory retirement plans, not between State and Federal retirees." Pet. App. A.5. The court noted that a "State worker is required to make regular, State-taxed, contributions to the retirement system in order to get a State tax-free pension on retirement."[1] *Id.* at A. 6. "The [federal military retirees]

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[1] Citing Mass. Gen. Laws Ann. c. 32, § 22(10)(West 1989), the amicus briefs of the United States below (at p. 7) and in this Court in *Filios* (at p. 6) consistently make the mistaken representation that state employees no longer make pension contributions. The Massachusetts statute in question simply takes advantage of the tax *deferral* option under 26 U.S.C. § 414(h)(2), but the funds in question remain employee income under § 414(h)(2) (and under state law, Mass. Gen. Laws Ann. c. 62 § 2(a)(1)(I)). The opportunity to defer

made no such contribution." *Id.* Accordingly, the Court held that the Massachusetts statutes do not violate 4 U.S.C. § 111 because they do not discriminate against a federal "officer or employee because of the source of the pay or compensation." *Id.*

The petition for a writ of certiorari was filed on March 25, 1996.

SUMMARY OF REASONS FOR DENYING PETITION

1. There is no conflict among federal circuit courts, state courts or decisions of this Court. Nor does any tension exist between Massachusetts' taxation of pensions and the non-discrimination principles of 4 U.S.C. § 111.

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taxation of an employee's income until retirement or separation from state service does not change the fact that the income belongs to and is taxable to the employee. *see Howell* v. *United States*, 775 F.2d 887, 889-90 (7th Cir. 1985).

Massachusetts taxpayers may deduct income from federal (as well as state and local) pensions for state income tax purposes, if the pension plan is contributory and the taxpayer has contributed to the plan. Massachusetts does not discriminate because of the source of the income; it distinguishes solely between contributory and non-contributory public plans.

2. The decision below does not present any issue of national significance. Petitioners cite a "grandfather clause" solely in Massachusetts law for persons now living, if any, who were employed as police and fire employees in Massachusetts in the mid-1930's who elected not to join the contributory system enacted at that time. The court below correctly held that even assuming that such a person were still alive, the statutory treatment of this small, finite class did not discriminate against federal retirees in violation of 4 U.S.C., § 111. Similarly, petitioners' argument that Massachusetts' state pension system is 10% contributory merely shows that,

like any contributory system, the Massachusetts plan involves contributions by the employer as well as employees. Nothing in this arrangement shows any discrimination against federal pensioners.

REASONS FOR DENYING PETITION

Under Supreme Court Rule 10, "review on Writ of Certiorari is not a matter of judicial right but of judicial discretion," and "will be granted only where there are special and important reasons therefor." The purpose of certiorari writs is to permit the Court to select cases of "such gravity and general importance" as to warrant full court review. *In Re Woods*, 143 U.S. 202, 206 (1892). For the reasons stated below, the petition does not satisfy the criteria that guide the Court's discretion to review a case. Accordingly, the petition should be denied.

I. THE COMMONWEALTH'S TAX STATUTES CONFORM TO THE FEDERAL ANTI-DISCRIMINATION STATUTE.

In the conceded absence of a conflict between decisions of the federal courts of appeals, state courts, or this Court,[2] the only question is whether petitioners have raised an issue of national importance. Their sole argument to that effect is based upon an alleged violation of 4 U.S.C. § 111.

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[2]Other decisions upholding state statutes against a challenge under 4 U.S.C. § 111 include *Brown* v. *Mierke*, 443 S.E.2d 462, 467 (W. Va.), *cert. denied sub nom., Brown* v. *Paige*, 115 S.Ct. 207 (1994)(upholding favorable treatment of a narrow class of former state and local employees, where military retirees were treated more favorably than many civilian and state retirees and were treated equally with some public employees); *Witte* v. *Director of Revenue*, 829 S.W.2d 436, 438 (Mo. En Banc 1992)(state tax did not single out state employees for favorable treatment, where many federal employees received the same tax treatment and the state tax did not unduly interfere with federal operations); *Alarid* v. *Sec. Of* N.M. Dept. of Tax. and Rev., 118 N.M. 23, 878 P. 2d 341 (Ct. App.),*cert. denied*, 118 N.M. 90, 879 P. 2d 91 (N.M. 1994) *cert. denied*, 115 S.Ct. 733 (1995).

The question under 4 U.S.C. § 111 is whether the Massachusetts system discriminates against the plaintiff taxpayers "because of the source of the pay or compensation." This clause codifies the nondiscrimination component of the federal constitutional doctrine of intergovernmental tax immunity, which "barred taxes that operat[e] so as to discriminate against the Government or those with whom it deals." *Davis*, 489 U.S. at 812 (quoting *United States* v. *City of Detroit*, 355 U.S. 466, 473 (1958)).

During the tax years at issue in this appeal, Massachusetts permitted the deduction from gross income from any contributory "retirement fund of the United States government." Massachusetts thus permits deductions not only by state contributory retirees, but also by "federal retirees who contributed to their benefits, such as members of the Central Intelligence Agency, Foreign Service, bankruptcy judges and United States magistrates." *See Barker* v. *Kansas*, 503 U.S.

594, 605 n.5 (1992). *See also* Mass. Dept. of Rev. Letter Ruling 83-38, reprinted in Off. Mass. Tax Guide at 652 (West 1996)(exemption for contributory annuity received by civilian employee of the Army and Air Force Exchange Service).

A tax on non-contributory pensions, combined with an exemption for contributory pensions, simply does not discriminate against the federal government or its employees. Contributory federal pensions receive the same treatment as contributory state pensions. G.L. c. 62, §§ 2(a)(1)(I), 3.B(a)(4), discussed above, pp. 3-4. This fact pattern does not bring this case within recent decisions of this Court striking down state taxation laws. Neither of the cases cited by petitioner involved a consistently-applied distinction between contributory and non-contributory pensions, regardless of their source. *Davis*, 489 U.S. at 805; *Barker*, 503 U.S. at 605 n.5.

Davis, 489 U.S. at 816, and *Barker*, 503 U.S. at 598, held that States may lawfully tax pensions differently if there

are "significant differences" between the pensions. A retiree who contributed to a pension plan paid consideration and has her own money funding the system, while a non-contributory retiree does not. In practice, in Massachusetts, there is an additional difference, namely the exposure of the employee's contributions to state taxation at the time of the contributions, through inclusion in Massachusetts gross income. If "significant differences" do not include distinctions based upon employees' payment of consideration to the employer's pension fund plus payment of income tax, then it is hard to imagine what differences might be considered significant enough to warrant different treatment of classes of pensions. At the very least, "[p]rinciples of federalism" require Congress to speak more clearly than it has here, if it intended to set such novel and strict "limits upon the taxation authority of state government, an authority [the Supreme Court has] recognized

as central to state sovereignty." See *Department of Revenue of Oregon* v. *ACF Industries, Inc.*, 114 S.Ct. 843, 850 (1994).

In short, unlike Michigan and Kansas, Massachusetts exempts all federal contributory pensions from state taxation. Since state and federal contributory systems are treated equally, as are non-contributory systems, there is no discrimination or inconsistent treatment, and § 111 does not come into play. *See Werner Machine Co., Inc.* v. *Director of Division of Taxation*, 350 U.S. 492, 493-94 (1956)("Since the tax remains the same whatever the character of the corporate assets may be, no claim can be sustained that this taxing statute discriminates against the federal obligations.") *Doneski* v. *Comptroller of the Treasury*, 91 Md. App. 614, 605 A.2d 649, 656 (1991), *cert. denied*, 327 Md. 523, 610 A.2d 796 (1992), *cert. denied*, 506 U.S. 1054 (1993).

II. PETITIONERS' ATTACKS ON THE MASSACHUSETTS TAX SYSTEM DO NOT INVOLVE QUESTIONS OF NATIONAL IMPORTANCE AND RAISE ISSUES OF STATE LAW.

1. The taxpayers assert (Pet. at 12-13) that Massachusetts' system is not contributory because the benefit levels are, allegedly, funded 90 percent by the state and approximately 10 percent by employee contributions (Pet. at 13). This argument appears to depend upon splitting the state benefits into two components--one contributory and one non-contributory. But state law, as applied by the Supreme Judicial Court in this case, treats the entire benefit package as one pension. *See* Pet. App. A.6. To the extent that petitioners argue otherwise, they are merely disagreeing with the state's highest Court on an issue of state law.

The Commonwealth's approach, in any event, is consistent with the usual understanding of the phrase

"contributory" pension, in which "employees, *as well as employers*, make payments to a pension fund". Black's Law Dictionary (6th ed.), p. 329 (emphasis added). *See* generally 29 U.S.C. §§ 1054(c), 1056(c)(ERISA provisions contemplating employer contributions); Canan, *Qualified Retirement and Other Employee Benefit Plans*, § 3.51, pp. 135-136 (West Publ. Co. 1992).[3]

Under the state law definition of contributory plan set forth in the Commissioner's Technical Information Release ("TIR") 92-3 the question is whether employee contributions are included in Massachusetts gross income. Massachusetts *does* include the pension plan contributions of its state and local employees in gross income for state tax purposes. Mass.

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[3]Based on the figures in *Hogan* v. *United States*, 513 F.2d 170, 172 (6th Cir.), *cert. denied*, 423 U.S. 836 (1975), it appears that federal employees once contributed only $10.3 billion (½ of the funded liability of $20.6 billion), which was only 13 percent of the total pension liability of $78.3 billion.

Gen. Laws. c. 62, § 2(a)(1)(I), quoted above, pp. 2-3. The state taxation system under attack here thus treats the contribution consistently as being paid from the state and local employees' income. Petitioners concede as much (Pet. at 15 and n. 10). The fact and degree of participation by the employer in funding benefits therefore is irrelevant. Any other conclusion would make legality under § 111 turn upon two moving targets: the percentage contribution by federal workers and by State workers, respectively. Such a fact-bound issue is not appropriate for Supreme Court review.

In short, petitioners have not provided any basis for disregarding the fact, found by the court below, that the exempt state (and local) pensions are contributory, and their pensions are not.

2. Petitioners also argue that there exists an obscure exemption for certain police and fire employees, if any, whose employment predated the 1930's and 1940's. It is

an enormous stretch for petitioners to call this a "state policy" of exemption. Indeed, petitioners' failure to allege more than a "small and dwindling" class of exempt retirees, even in Massachusetts (Pet. App. A.8), leads directly to the conclusion that this issue is not "significant," let alone one of national importance such as to warrant review by this Court.

The state provision in question exempts from taxation any pension received on account of service by local "police and fire department" employees who were so employed before establishment of the contributory retirement system *and* who did not elect to join the contributory retirement system. Mass. St. 1973, c. 876, § 1. This provision is a "grandfather clause" for police and fire employees whose employment predated the state legislation in the 1930's and 1940's that made all public retirement systems mandatory. *See* Pet. App. A.7 - A.8. Petitioners do not claim that such a provision exists in other States.

The court below held that the grandfather clause was not discriminatory under 4 U.S.C. § 111. The court explained that the clause favored a class of retirees not on the basis of the source of their pay, but "on the basis of their occupation (police and firefighters) and date of first employment (before 1938)." Pet. App. A.8. The court also found correctly that the clause "protects a small and dwindling class." *Id.* Even assuming, as did the court below (*id.* at A.7-8 n.4), that there are currently exempted retirees covered by the clause, there is simply no record proof of discrimination, much less any indication of an issue of national importance.

More generally, petitioners do not argue that the grandfather clause shows that the Massachusetts system of *exemption* for contributory pensions is in any way under- or over-inclusive. They only argue that *taxation* of non-contributory pensions is very minimally under-inclusive. The validity of state law must turn upon the overriding and

overwhelming effect of the law as a whole, that is, "the generality of cases, not the rare exceptions." *See Mathews* v. *Eldridge*, 424 U.S. 319, 344 (1976)(discussing constitutional procedural due process analysis); *Weinberger* v. *Salfi*, 422 U.S. 749, 777 (1975)(evaluating federal legislation under the rational basis test). In short, the grandfather clause and its dwindling subject class do not present issues of national importance warranting review by this Court.[4]

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[4]Finally, petitioners quote the amicus brief of the United States filed in this Court in *Filios* and argue that the decision below "would serve as a guidepost for States seeking to circumvent" 4 U.S.C. § 111. Pet. at 18. Nearly three years have passed since the decision of the Supreme Judicial Court in *Filios*; two years have passed since the Court denied certiorari in *Filios*, and the Commissioner is unaware of any State that has enacted a law similar to the Massachusetts law at issue.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 95 - 1542

In The
Supreme Court of the United States
October Term, 1995

LELAND A. COOPER, ET AL.
PETITIONERS

v.

COMMISSIONER OF REVENUE OF MASSACHUSETTS
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

PETITIONERS' REPLY TO THE BRIEF IN OPPOSITION

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9 pp

TABLE OF CONTENTS

Page

I. THIS CASE RAISES QUESTIONS OF NATIONAL IMPORTANCE. 2

A. The Record Before the Court 2

B. Unless Reversed, the Decision Below Will Accelerate Other States' Efforts to Circumvent 4 USC § 111 and This Court's Decisions. 2

CONCLUSION 5

TABLE OF AUTHORITIES

CASES

Barker v. Kansas, 503 U.S. 594,
118 L. Ed. 2d 243 (1992) 3

Davis v. Michigan Dept. of Treasury,
489 U.S. 803 (1989) 3

Harper v. Virginia Department of Taxation, -- U.S. --,
125 L. Ed. 2d 74 (1993) 3

Kerr v. Waddell, 899 P. 2d 162 (Ariz. App. 1995),
remanded on other grounds, 1 CA-Tax 92-0010
(Ariz. App. Apr. 23, 1996) 4

Ragsdale v. Department of Revenue, 895 P. 2d 1348
(Or. 1995) 3

Sheedy v. Public Employees Ret. Div., 864 P. 2d 762
(Mont. 1993) 4

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const., art I, § 8, cl. 12, 13, 14 2

4 U.S.C. §111 . . . . . 2, 3,4

Or. Laws 1995, c. 569 . . . . . 3n

U.S. SUPREME COURT RULES

Rule 15.6 1

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PETITIONERS' REPLY TO THE BRIEF IN OPPOSITION

Pursuant to Rule 15.6 of the Rules of this Court, petitioners Leland A. Cooper et al. submit this Reply to the Brief in Opposition to the Petition filed in this case.

I. THIS CASE RAISES QUESTIONS OF NATIONAL IMPORTANCE.

A. The Record Before the Court.

Respondent asks this Court to deny the petition for a writ of certiorari on the grounds, among others, that petitioners' claims do not raise "issues of national importance warranting review by this Court." Brief in Opposition at 22. The record before the Court convincingly demonstrates the contrary.

Petitioners respectfully call to the Court's attention the brief amicus curiae filed by the Retired Officers Association and Twenty Two Other Military and Veterans Organizations ("TROA") with a combined membership of one million men and women who are retired, reserve or active members of the uniformed services. As ROA's brief notes, Massachusetts' policy of taxing federal military retirees' benefits, while completely exempting benefits received by state and local retirees, presents a direct threat to Congress' ability to choose how to compensate the men and women responsible for our national defense, a consideration of obvious national importance. See U.S. Const., art. I, § 8, cl. 12, 13 and 14.

Further evidence that the decision below does raise matters of national significance is the fact that the Solicitor General has filed a brief amicus curiae supporting the petition. As the Solicitor General notes, "[t]he United States has a continuing interest in ensuring that its employees are not subjected to discriminatory tax treatment." Brief for the United States as Amicus Curiae Supporting Petitioners at 2.

B. Unless Reversed, the Decision Below Will Accelerate Other States' Efforts to Circumvent 4 USC § 111 and This Court's Decisions.

The Brief in Opposition seeks to undercut the national

significance of the issue raised in this case by mentioning, in a footnote, that no state "has enacted a law similar to the Massachusetts law at issue." Brief in Opposition at 22, n.4. While that may or not be true, it avoids the more serious point. Massachusetts' policy of discriminating in favor of state employees is only the most blatant of a number of different attempts by other states to achieve the same end. Review by this Court is called for to ensure the defeat of those efforts to deny federal workers their constitutional protections.

As this Court has noted, in a case involving application of 4 U.S.C. 111, state courts have shown difficulty in accepting this Court's decisions in this area "as a controlling statement of federal law." Harper v. Virginia Department of Taxation, -- U.S. --, 125 L. Ed. 2d 74, 83-84 (1993). In the brief for the United States supporting the petition, the Solicitor General warned that "[i]f the decision in this case were allowed to stand, it would serve as a guidepost for States seeking to circumvent the clear restrictions imposed by 4 U.S.C. 111 and this Court's prior decisions." Brief for the United States as Amicus Curiae Supporting Petitioners at 7.

Evidence for the persistence of such efforts is not hard to find. For example, one Oregon judge recently noted in dissent that the Oregon Supreme Court was "approv[ing] a legislative device specifically and narrowly tailored to avoid the rule of intergovernmental tax immunity that was explicated [in Davis, Harper and Barker]." Ragsdale v. Department of Revenue, 895 P. 2d 1348, 1357 (Or. 1995)(Gillette, J. dissenting)(emphasis added). The law in that case provided for payments to state retirees intended to serve as a "partial refund of state income taxes paid by state retirees . . . " Id. at 1358.[1] Needless to say, no similar tax

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1. Oregon's ongoing effort to discriminate in favor of its retirees has apparently most recently resulted in a scheme whereby the state collects "tax" from retirees, but then pays them "damages" at the highest marginal statutory rate of tax plus 9% interest. See Or. Laws 1995, c. 569.

offsets were made available to federal retirees. A similar "adjustment," intended to protect state, but not federal, retirees from the impact of state taxes was struck down by the Montana Supreme Court. See Sheedy v. Public Employees Ret. Div., 864 P. 2d 762, 768 (Mont. 1993) (invalidating law as "a partial tax rebate denominated otherwise in an attempt to evade the requirements of federal law.")(emphasis added).

Massachusetts, like a number of other states, seems to think that intergovernmental tax immunity is some sort of game and that, so long as it is sufficiently clever, it can continue to provide its retirees with tax free retirement benefits while retaining the "cake" of taxing federal military retirees. But, as the Arizona Court of Appeals recently noted in striking down yet another state tax law as violative of 4 USC § 111:

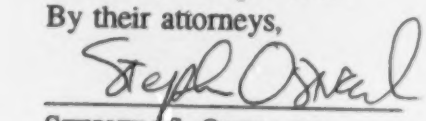
> [w]hat defendants' reasoning ultimately boils down to is that indirect discriminatory taxation that is not specifically intended to operate as such, is not discriminatory at all. Defendants cite no authority that would support this idea in the tax arena, and we are aware of none.

Kerr v. Waddell, 899 P. 2d 162, 176 (Ariz. App. 1995), remanded on other grounds, 1 CA-Tax 92-0010 (Ariz. App. Apr. 23, 1996)

CONCLUSION

For the foregoing reasons and for the reasons stated in their previously filed petition, petitioners request that their application for a writ of certiorari be granted and that, after hearing, the December 26, 1995 decision of the Supreme Judicial Court of the Commonwealth of Massachusetts be reversed.

Respectfully submitted,
Leland A. Cooper et al.
By their attorneys,



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